Y 4.J 89/1:103-20

CABLE AND SATELLITE CARRIER COMPULSORY LICENSES

HEARING

BEFORE THE

SUBCOMMITTEE ON INTELLECTUAL PROPERTY AND JUDICIAL ADMINISTRATION

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRD CONGRESS

FIRST SESSION

ON

H.R. 759 and H.R. 1103

CABLE AND SATELLITE CARRIER COMPULSORY LICENSES

MARCH 17, 1993

Serial No. 20

GOV'T. DEPOSITORY
MAR 2 8 1994

Printed for the use of the Committee on the Judiciary

HAMPDEN LAW LIBRARY

U.S. GOVERNMENT PRINTING OFFICE
72-608 WASHINGTON : 1994

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402
ISBN 0-16-043678-8

APR 0 1 2003
BOSTON PUBLIC LIBRARY
GOVERNMENT DOCUMENTS DEPARTMENT

CABLE AND SATELLITE CARRIER COMPULSORY LICENSES

HEARING

BEFORE THE

SUBCOMMITTEE ON INTELLECTUAL PROPERTY AND JUDICIAL ADMINISTRATION

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRD CONGRESS

FIRST SESSION

ON

H.R. 759 and H.R. 1103

CABLE AND SATELLITE CARRIER COMPULSORY LICENSES

MARCH 17, 1993

Serial No. 20

GOV'T. DEPOSITORY
MAR 2 8 1994
HAMPDEN LAW LIBRARY

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
72-608 WASHINGTON : 1994

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402
ISBN 0-16-043678-8

BOSTON PUBLIC LIBRARY
GOVERNMENT DOCUMENTS DEPARTMENT

COMMITTEE ON THE JUDICIARY

JACK BROOKS, Texas, *Chairman*

DON EDWARDS, California
JOHN CONYERS, JR., Michigan
ROMANO L. MAZZOLI, Kentucky
WILLIAM J. HUGHES, New Jersey
MIKE SYNAR, Oklahoma
PATRICIA SCHROEDER, Colorado
DAN GLICKMAN, Kansas
BARNEY FRANK, Massachusetts
CHARLES E. SCHUMER, New York
HOWARD L. BERMAN, California
RICK BOUCHER, Virginia
JOHN BRYANT, Texas
GEORGE E. SANGMEISTER, Illinois
CRAIG A. WASHINGTON, Texas
JACK REED, Rhode Island
JERROLD NADLER, New York
ROBERT C. SCOTT, Virginia
DAVID MANN, Ohio
MELVIN L. WATT, North Carolina
XAVIER BECERRA, California

HAMILTON FISH, JR., New York
CARLOS J. MOORHEAD, California
HENRY J. HYDE, Illinois
F. JAMES SENSENBRENNER, JR., Wisconsin
BILL McCOLLUM, Florida
GEORGE W. GEKAS, Pennsylvania
HOWARD COBLE, North Carolina
LAMAR S. SMITH, Texas
STEVEN SCHIFF, New Mexico
JIM RAMSTAD, Minnesota
ELTON GALLEGLY, California
CHARLES T. CANADY, Florida
BOB INGLIS, South Carolina
BOB GOODLATTE, Virginia

JONATHAN R. YAROWSKY, *General Counsel*
ROBERT H. BRINK, *Deputy General Counsel*
ALAN F. COFFEY, JR., *Minority Chief Counsel*

SUBCOMMITTEE ON INTELLECTUAL PROPERTY AND JUDICIAL ADMINISTRATION

WILLIAM J. HUGHES, New Jersey, *Chairman*

DON EDWARDS, California
JOHN CONYERS, JR., Michigan
ROMANO L. MAZZOLI, Kentucky
MIKE SYNAR, Oklahoma
BARNEY FRANK, Massachusetts
HOWARD L. BERMAN, California
JACK REED, Rhode Island
XAVIER BECERRA, California

CARLOS J. MOORHEAD, California
HOWARD COBLE, North Carolina
HAMILTON FISH, JR., New York
F. JAMES SENSENBRENNER, JR., Wisconsin
BILL McCOLLUM, Florida
STEVEN SCHIFF, New Mexico

HAYDEN W. GREGORY, *Counsel*
EDWARD O'CONNELL, *Assistant Counsel*
WILLIAM F. PATRY, *Assistant Counsel*
JARILYN DUPONT, *Assistant Counsel*
THOMAS E. MOONEY, *Minority Counsel*
JOSEPH V. WOLFE, *Minority Counsel*

CONTENTS

HEARING DATE

Page

March 17, 1993 1

TEXTS OF BILLS

H.R. 759 8
H.R. 1103 3

OPENING STATEMENT

Hughes, Hon. William J., a Representative in Congress from the State of New Jersey, and chairman, Subcommittee on Intellectual Property and Judicial Administration 1

WITNESSES

Boucher, Hon. Rick, a Representative in Congress from the State of Virginia .. 11
Foster, Janet L., co-founder and president, PrimeTime 24, New York, NY 40
Hargrove, Wade H., Esq., Tharrington, Smith & Hargrove, on behalf of Network Affiliated Stations Alliance, Raleigh, NC 49
Hewitt, Charles C., president, Satellite Broadcasting and Communications Association of America 32
Oman, Ralph, Register of Copyrights and Associate Librarian for Copyright Services, Library of Congress, accompanied by William Roberts, Senior Attorney, and Marilyn Kretsinger, Assistant General Counsel 15
Padden, Preston R., senior vice president, affiliates, Fox Broadcasting Co. 46
Sonnenberg, Alan, chief executive officer and chairman, ACS Enterprises, Inc., Bensalem, PA, on behalf of the Wireless Cable Association International, Inc. 81

LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING

Boucher, Hon. Rick, a Representative in Congress from the State of Virginia: Prepared statement 13
Foster, Janet L., co-founder and president, PrimeTime 24, New York, NY: Prepared statement 42
Hargrove, Wade H., Esq., Tharrington, Smith & Hargrove, on behalf of Network Affiliated Stations Alliance, Raleigh, NC: Prepared statement 51
Hewitt, Charles C., president, Satellite Broadcasting and Communications Association of America: Prepared statement 33
Oman, Ralph, Register of Copyrights and Associate Librarian for Copyright Services, Library of Congress: Prepared statement 17
Padden, Preston R., senior vice president, affiliates, Fox Broadcasting Co.: Prepared statement 48
Sonnenberg, Alan, chief executive officer and chairman, ACS Enterprises, Inc., Bensalem, PA, on behalf of the Wireless Cable Association International, Inc.: Prepared statement 82

APPENDIXES

Appendix 1.—Letter from G. Todd Hardy, Esq., Hardy and Ellison (with attachments), to Hon. William J. Hughes, chairman, Subcommittee on Intellectual Property and Judicial Administration, March 25, 1993 87

Page

Appendix 2.—Letter from Paula A. Jameson, senior vice president, general counsel and secretary, Public Broadcasting Service (with attachment), to Hon. William J. Hughes, chairman, April 13, 1993 99
Appendix 3.—Letter from David D. Alworth, executive director, Broadcasting, Office of the Commissioner, Major League Baseball, to Hon. William J. Hughes, chairman, April 27, 1993 104
Appendix 4.—Statement of position of the Network Affiliated Stations Alliance on H.R. 1103 (with attachments), undated 108
Appendix 5.—Examples of abuse of the Home Satellite Viewier Act by satellite carriers (14 letters to Wade Hargrove, Esq., Tharrington, Smith & Hargrove) 118

CABLE AND SATELLITE CARRIER COMPULSORY LICENSES

WEDNESDAY, MARCH 17, 1993

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON INTELLECTUAL PROPERTY
AND JUDICIAL ADMINISTRATION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:09 a.m., in room 2226, Rayburn House Office Building, Hon. William J. Hughes (chairman of the subcommittee) presiding.

Present: Representatives William J. Hughes, Don Edwards, Jack Reed, Xavier Becerra, Carlos J. Moorhead, Howard Coble, F. James Sensenbrenner, Jr., and Bill McCollum.

Also present: Hayden Gregory, counsel; William Patry, assistant counsel; Phyllis Henderson, secretary; and Thomas E. Mooney, minority counsel.

OPENING STATEMENT OF CHAIRMAN HUGHES

Mr. HUGHES. The Subcommittee on Intellectual Property and Judicial Administration will come to order.

Good morning and welcome to today's hearing on H.R. 1103 and H.R. 759. These bills are identical in purpose, though not in scope. H.R. 759, introduced by our colleague Rick Boucher, a former member of the subcommittee, and by Mr. Moorhead, the distinguished ranking minority member of the subcommittee, amends the definition of "cable system" in section 111(f) of the Copyright Act to include wireless cable and other technologies.

Title II of H.R. 1103 also amends section 111(f), but uses a generic definition to similarly include wireless and other technologies. This definition was taken from last Congress' H.R. 4511, a general cable reform bill that Mr. Moorhead, Chairman Brooks, and myself introduced.

The purpose of both H.R. 759 and H.R. 1103 is to provide a level playing field for new technologies that offer competition to traditional cable systems.

By encouraging new forms of delivering television programming, we will increase consumers' choices, improve service, and, hopefully, reduce costs.

Recently, in drafting the new rules for the 1992 Cable Reform Act, the FCC noted a point Mr. Moorhead and I had emphasized in the last Congress: competition brings down prices. The FCC and others studying the industry have found that where there is more than one multichannel video service available, the costs to consum-

ers are lower than where there is only one such service. H.R. 1103 and H.R. 759 are based on this simple economic fact.

Finally, let me address title I of H.R. 1103, which contains a provision not found in H.R. 759: extension of the section 119 satellite carrier compulsory license. Section 119 of the Copyright Act is a real success story. It has permitted satellite carriers to deliver network programming to tens of thousands of residents of rural and other areas that cannot receive over-the-air signals. The provisions on retransmission of superstations have resulted in the development of new program packages for the home satellite dish market.

The compulsory license rates were originally set in the statute. An ad hoc arbitration panel subsequently adjusted those rates. The arbitration panel's decision was praised by the parties and was the precedent for the proposal in H.R. 897 to abolish the CRT and assign many of its functions to arbitration panels.

Extension of section 119 will ensure that satellite dish owners may continue to receive television programming for private viewing. I am very pleased that my colleague Carlos Moorhead joined with me in introducing H.R. 1103. His leadership, as always, is very much appreciated.

[The bills, H.R. 1103 and H.R. 759, follow:]

I

103D CONGRESS
1ST SESSION

H. R. 1103

To amend title 17, United States Code, with respect to secondary transmissions of superstations and network stations for private home viewing, and with respect to cable systems.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 24, 1993

Mr. HUGHES (for himself and Mr. MOORHEAD) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend title 17, United States Code, with respect to secondary transmissions of superstations and network stations for private home viewing, and with respect to cable systems.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—SATELLITE CARRIERS

SEC. 101. SECONDARY TRANSMISSIONS BY SATELLITE CARRIERS.

Section 119 of title 17, United States Code, is amended as follows:

(1) Subsection (a)(2)(C) is amended in the first sentence—

(A) by striking "90 days after the effective date of the Satellite Home Viewer Act of 1988, or"; and

(B) by striking "whichever is later,".

(2) Subsection (b)(1)(B) is amended—

(A) in clause (i) by striking "12 cents" and inserting "17.5 cents per subscriber in the case of superstations not subject to syndicated exclusivity under the regulations of the Federal Communications Commission, and 14 cents per subscriber in the case of superstations subject to such syndicated exclusivity"; and

(B) in clause (ii) by striking "3" and inserting "6".

(3) Subsection (c) is amended—

(A) in the subsection caption by striking "DETERMINATION" and inserting "ADJUSTMENT";

(B) in paragraph (1)—

(i) by striking "until December 31, 1992,"; and

(ii) by striking "compulsory";

(C) in paragraph (2)—

(i) by striking subparagraph (A) and redesignating subparagraphs (B), (C), and (D) as subparagraphs (A), (B), and (C), respectively;

(ii) in subparagraph (A) (as so redesignated) by striking "Satellite" in the first sentence and inserting "In accordance with paragraph (3), satellite"; and

(iii) in subparagraph (C) (as so redesignated) by striking "December 31, 1994" and inserting "adjusted under paragraph (3)"; and

(D) in paragraph (3)(A) by striking the first sentence and inserting the following: "On or before June 1, 1995, and in each subsequent fifth calendar year, the Copyright Royalty Tribunal shall cause notice to be published in the Federal Register of the initiation of arbitration proceedings for the purpose of determining a reasonable royalty fee to be paid under subsection (b)(1)(B) by satellite carriers who are not parties to a voluntary agreement filed with the Copyright Office in accordance with paragraph (2).".

TITLE II—SECONDARY TRANSMISSIONS BY CABLE SYSTEMS

SEC. 201. DEFINITION OF CABLE SYSTEM.

(a) DEFINITION.—Section 111(f) of title 17, United States Code, is amended by striking the definition of "cable system" and inserting the following:

"A 'cable system' is a facility, other than a satellite carrier to which section 119 of this title applies, that in whole or in part receives signals embodying a performance or display of a work, transmitted by one or more broadcast stations licensed by the Federal Communications Commission or an appropriate governmental authority of Canada or Mexico, and makes secondary transmissions of such signals to subscribing members of the public who pay for such service."

(b) APPLICABILITY OF FEDERAL COMMUNICATIONS COMMISSION RULES AND REGULATIONS.—For purposes of determining the royalty fees paid under subsection (d)(1) of section 111 of title 17, United States Code, by a cable system as defined in subsection (f) of such section (as amended by subsection (a) of this section), the rules and regulations of the Federal Communications Commission in effect on the date of the enactment of this Act shall apply on and after such date to all cable systems

as so defined to the same extent as such rules and regulations applied to cable systems before such date.

○

I

103D CONGRESS
1ST SESSION

H. R. 759

To amend chapter 1 of title 17, United States Code, to include in the definition of a cable system a facility which makes secondary transmissions by microwave or certain other technologies.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 3, 1993

Mr. BOUCHER (for himself and Mr. MOORHEAD) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend chapter 1 of title 17, United States Code, to include in the definition of a cable system a facility which makes secondary transmissions by microwave or certain other technologies.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Compulsory License Clarification Act of 1993".

SEC. 2. INCLUSION OF FACILITIES MAKING SECONDARY TRANSMISSIONS BY MICROWAVE OR OTHER TECHNOLOGIES IN DEFINITION OF CABLE SYSTEM.

Section 111(f) of title 17, United States Code, is amended in the 3rd paragraph by striking "or other communications channels" and inserting "microwave, or any other technologies employed for the local distribution of secondary transmissions of broadcast programming".

O

Mr. HUGHES. The testimony today should be very interesting. We look forward to receiving it.

The gentleman from California.

Mr. MOORHEAD. Thank you, Mr. Chairman. I would like to commend you on holding these early hearings on two important issues.

Wireless cable has enjoyed the compulsory license since its inception. The industry was made possible by FCC rule changes in 1983. The first system became operational in 1986. A 1992 ruling by the Register of Copyrights, however, would strip the industry of the compulsory license in 1994, unless Congress acts before then to reverse the Copyright Office's ruling.

In my opinion, and that of Rick Boucher, wireless cable's entitlement to the license is fully supported by the Copyright Act and its legislative history. The act specifically authorizes a compulsory license for "cable systems," defined to mean systems making transmission "by wires, cables or other communication channels." The legislative history of the act makes clear that Congress intended the compulsory license to be technology neutral, as the courts have consistently held.

In response to the Copyright Office's ruling, Rick Boucher and I introduced the Compulsory License Clarification Act of 1993. We introduced the same bill last Congress. I am pleased to see that the gentleman from Virginia is on the witness list this morning. He and I are in 100 percent agreement on this issue.

Quick action on these bills will guarantee wireless cable and satellite carriers' position as strong and significant competitors of cable. I certainly agree with the statement of our chairman that wherever there is competition the price to the consumer is down. We have done all kinds of things to try to control the cost to the consumer of cable television. But in one area of the country the price may be twice as high as it is in another area, depending upon the competition among entertainment channels and the things that may be available for entertainment for people that live in the area. For instance, my cable bill in California is about 50 percent of what it is here in Fairfax County and the systems are no different really as to what they offer.

Competition is a very, very important thing. And, if we do away with the competition that can be given by wireless cable, we are not only going to kill a growing industry but we are also going to raise the cost of cable television for our consumers. I don't want to see that happen. I want to see this legislation passed.

Mr. HUGHES. I thank the gentleman.

Our first witness this morning is Representative Rick Boucher from the Ninth District of Virginia. Rick was elected to Congress in 1982. He has been very active, to say the least, in the copyright and telecommunications areas, particularly satellites and wireless cable. For many years he was a very valued member of this subcommittee and it was just unfortunate in this Congress that as we bid for various subcommittees, he did not join us. But we are delighted to have his testimony this morning.

Rick, we have a copy of your statement, which, without objection, will be made a part of the record in full. We hope you can summarize for us, but you may proceed as you see fit.

Welcome.

STATEMENT OF HON. RICK BOUCHER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA

Mr. BOUCHER. Thank you very much, Mr. Chairman. It is my pleasure to return to this subcommittee, and I appreciate the invitation you have extended for me to testify here this morning.

I am pleased, enthusiastically, to endorse the legislation that you have introduced with Mr. Moorhead, H.R. 1103, which would extend the section 119 license that is available for the transmission of superstation and network signals to backyard dish owners, created in 1988 as a part of the Satellite Home Viewer Act, and also to ensure that wireless cable and other technologies for terrestrial delivery of cable signals enjoy the section 111 compulsory license.

The Satellite Home Viewer Act of 1988 will expire in December 1994, but I think, Mr. Chairman, that it is very appropriate for the extension of that legislation to occur at an earlier time. The common carriers need to make investments in new technology, and in order to have the assurance that the license of section 119 will apply for them and to get bank financing for those new investments, it is very appropriate that that license be extended as soon as possible. So I applaud your early willingness to address that issue and to have this hearing, and would urge the subcommittee to move forward with the extension of the section 119 license as soon as possible.

That license is very necessary so that dish owners across the United States can receive both network signals and superstation signals. In 1988, it became apparent to a number of us that some of the major networks were planning to scramble their signals and were basically announcing no intention to make an unscrambled signal available for backyard dish owners who couldn't get that signal any other way, and we introduced the 1988 legislation for that reason principally.

What it provides is that if a dish owner lives in what we call a "white" area and can't get the signal of the network from any other source, meaning a local broadcast station, then that dish owner has the privilege of receiving the network signal over the satellite by virtue of the section 119 license. That white area provision has worked reasonably well. It is not entirely without controversy. You may hear from some sources that there have been some glitches with regard to it, but I think generally it has worked quite well and for that reason is worthy of extension.

We have a somewhat different but equally compelling problem with regard to superstation signals. Many of the superstations are owned in whole or in part by the cable multiple system operators, and those that are not owned in whole or in part by cable MSO's are at least subject to the negotiating leverage and pressure of the cable companies, virtually all of which would greatly prefer that the superstation signals be delivered exclusively over cable systems and not made available to cable competitors, including dish owners.

So we added to the 1988 legislation provisions dealing with superstations, and as a result of the passage of that law, the superstation signals are available to dish owners wherever they reside, whether in urban areas or in rural locations. The conditions that led to the 1988 legislation, meaning the white area needs with respect to network signals and also the need for dish owners wher-

ever they are situated to receive signals originated by superstations, are as apparent today as they were in 1988, and so I think the section 119 license definitely needs to be extended on both counts.

I would have two suggestions for the subcommittee with regard to amendments of the section 119 license. First, I would point out that the satellite carriers completed on May 1, 1992, an arbitration with respect to rates that was required in the 1988 legislation. H.R. 1103 would require another arbitration with respect to rates on June 1, 1995, and then each 5 years thereafter. That formulation would leave effective the 1992 arbitrated rates only for a period of 3 years, and I would suggest that those rates be left available for a period of 5 years and enjoy that longevity. So I would suggest that the first arbitration required by H.R. 1103 be set for June 1, 1997, and then each 5 years thereafter.

Second, I would recommend that the definition of satellite carrier under the section 119(d) license be expanded so as to ensure that it covers all satellite services that are delivered to dish owners, including the new KU-band services associated with direct broadcast satellite and several other variations of the KU-band offerings, and I will provide to the subcommittee some suggested language that will accomplish that goal.

With regard to the extension of the cable compulsory license to terrestrial means of delivering cable signals apart from traditional cable companies, including wireless cable and other forms of technology, I endorse fully the comments of Mr. Moorhead with regard to the need for that extension. Wireless cable has always enjoyed the cable compulsory license. The Copyright Office last year determined that it should no longer enjoy that because of its reading of the statute that provides for the section 111 compulsory license. Frankly, I disagree with that reading. I think it was far too narrow.

We are seeking through our legislation, the bill that Mr. Moorhead and I have introduced, and also H.R. 1103, to correct that problem and to make sure that wireless cable and other forms of technology that operate terrestrial means of retransmitting broadcast signals will enjoy that license. As a practical matter, that is very necessary. Wireless cable companies simply could not negotiate one on one with all of the copyright owners and obtain the clearances necessary to retransmit signals, and so as a practical matter, if we don't provide the means for the compulsory license to apply to wireless cable we very well could put that industry out of business. So I think it is very important that this legislation be passed. I endorse it fully. I commend you, Mr. Chairman, and Mr. Moorhead, for bringing it forward, and I will offer whatever help I can at full committee and thereafter in assisting you with its passage.

And I thank you very much for giving me this chance to come and testify today.

Mr. HUGHES. Thank you very much, Rick, for a very fine statement. We appreciate the two very constructive suggestions you have made, and we certainly will keep those suggestions in mind—I think that they have a lot of merit—as this moves through the process. I have no questions.

[The prepared statement of Mr. Boucher follows:]

PREPARED STATEMENT OF HON. RICK BOUCHER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA

Thank you for scheduling this hearing and for inviting me to testify.

Mr. Chairman, I strongly endorse the legislation you have introduced along with the ranking Member of the Subcommittee, Mr. Moorhead. I would urge the Subcommittee to approve H.R. 1103.

Prompt passage of H.R. 1103 is essential if we are to ensure the continued viability of two emerging cable competitors—wireless cable and home satellite dish delivery systems. Both of these industries are facing 1994 deadlines for the expiration of licenses which enable them to provide consumers with video programming. The uncertainty about whether these licenses will be extended is harming the ability of these industries to enter into contracts, to sign up subscribers, to obtain loans, and to expand their businesses.

Last month, Congressman Moorhead and I introduced H.R. 759, the Compulsory License Clarification Act of 1993. Our objective in introducing this legislation was the same as the objective of Title II of H.R. 1103—to clarify Congress' original intent when it amended the Copyright Act in 1976 to create the compulsory license, which permits cable systems to carry broadcast programming without incurring copyright liability. This clarification is needed because of a January 29, 1992 ruling by the Copyright Office which interprets the 1976 amendments too narrowly and would strip wireless cable of its right to the license.

In 1976, Congress amended the Copyright Act with respect to cable system retransmission of broadcast signals. Recognizing that it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose programming was retransmitted through the carriage of local broadcast signals on cable systems, Congress created a compulsory license scheme by which cable systems could meet their copyright responsibilities.

Under the Copyright Act, "cable systems" are eligible for the license. The language of the Act shows that Congress did not intend to limit eligibility for the compulsory license to coaxial cable systems. In section 111(f) of the Act a "cable system" is defined as "a facility, located in any State, Territory, Trust Territory, or Possession, that in whole or in part receives signals transmitted or programs broadcast by one of more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs *by wires, cables, or other communications channels* to subscribing members of the public who pay for such service" (emphasis added).

Although this language is clearly broad enough to encompass transmissions through wireless cable technology, a little over a year ago the Copyright Office issued a final rule denying wireless cable systems the benefits of the compulsory license. The Copyright Office concluded that the phrase "other communications channels" was intended merely to extend the compulsory license to coaxial cable systems that utilize wireless technology to extend their signal into unwired areas—so-called "hybrid systems." This strained interpretation is not supported by either the plain language of the Act or its legislative history.

Recognizing that its decision to deny the compulsory license to wireless cable systems is a controversial one that could have a serious adverse effect on the wireless cable industry, the Copyright Office has delayed until January 1, 1994 the effective date of its rule. In granting this delay, the Copyright Office expressly intended to give Congress adequate time to adopt legislation clarifying the eligibility of wireless cable systems for the compulsory license.

The wireless cable industry has utilized the compulsory license since the first wireless system became operational in 1986. The future of the wireless cable industry depends upon the continued availability of the compulsory license. As a practical matter, without the compulsory license a wireless cable operator will be unable to clear the copyrights of each program it wishes to carry on an individual basis.

H.R. 1103 will amend the definition of a "cable system" in the statute to ensure the availability of the compulsory license for wireless cable and other technologies employed for the local distribution of secondary transmissions of broadcast programming. This measure will ensure that the compulsory license is available on a technology-neutral basis and will help ensure that alternative video transmission technologies will be able to provide competition to the cable television industry.

I strongly support the extension of the Satellite Home Viewer Act of 1988 which is contained in Title I of H.R. 1103. That Act, which is scheduled to expire on December 31, 1994, created a special satellite compulsory license to enable satellite carriers to deliver network and superstation programming to home satellite dish

owners. It limited the statutory license for network programming to secondary transmissions to persons who live in unserved households, meaning households that cannot receive over-the-air a broadcast signal of grade B intensity. This "white area" exception was the result of extensive negotiations, and for the most part has worked quite well.

As a result of the passage of this Act, more than 1 million home satellite dish owners have been able to receive a wide variety of superstation and broadcast programming. Many of my constituents would be unable to receive this programming without a home satellite dish, either because the local cable company will not extend service to their residences or because they cannot get broadcast signals over-the-air. Extension of the satellite license will ensure that home satellite dish owners will continue to be able to get the same news, sports and entertainment programming that those fortunate enough to live in more densely populated or less mountainous areas receive.

I have a couple of suggestions for improvements in H.R. 1103. First, the satellite carriers completed the arbitration required under the Act on May 1, 1992. The bill would require them to undergo another arbitration proceeding on June 1, 1995, and every five years thereafter. This would mean that the rates arrived at in the most recent arbitration would be good for only three, rather than five, years. I would suggest that we change the date in the bill so that the first arbitration would be scheduled for June 1, 1997.

Second, I would suggest that we modify the definition of "satellite carrier" under section 119(d) to clarify Congress' intent that the Act cover all direct-to-home services, including both fixed satellite and direct broadcast satellite (DBS) services. While the current definition of "satellite carrier" is arguably broad enough to cover all of these services, a simple amendment would remove any lingering doubt as to the scope of the definition. I think that in light of past experiences with narrower than expected interpretations of statutory language by the Copyright Office we should use this bill to make it absolutely clear that all of these satellite services are covered by the section 119 license. Mr. Chairman, I will provide your staff with proposed language on this point.

Again, I would like to thank you Mr. Chairman for holding this hearing. I hope that my colleagues will join me in supporting H.R. 1103.

Mr. HUGHES. The gentleman from California.

Mr. MOORHEAD. Well, I certainly would join you in commending Mr. Boucher. You know, you were such an outstanding member of this subcommittee. We really miss you on the subcommittee. We hope the next time around that you will choose this first, because it is a place where we really get some very interesting issues.

And I can only repeat what you have said. That this legislation is necessary. We are going to lose a very important industry, and we are going to lose the competition for cable that we dreamed we would have when we first passed the cable bill. We thought there would be some competition that would be available in these industries. I think we have gone about it in the wrong way in the cable bill we passed last year, but this is at least a positive way that we can help improve the situation. So thank you for your leadership.

Mr. BOUCHER. Thank you very much, Mr. Moorhead.

Mr. HUGHES. The gentleman from North Carolina.

Mr. COBLE. You have been duly praised this morning, Rick. I will just reiterate. It is good to have you before us.

Mr. BOUCHER. Thank you very much.

Mr. COBLE. What did you say, Mr. Chairman?

Mr. HUGHES. He has got the time. You can add some more.

Mr. COBLE. OK. Well, that is fine. I will just extend a welcome to him and let it go at that.

Thank you very much.

Mr. BOUCHER. Thank you.

Mr. HUGHES. Rick, thanks for the leadership.

Mr. BOUCHER. Thank you for your hospitality.

Mr. HUGHES. We appreciate it very much.

Mr. HUGHES. Our next witness, as at many hearings, is Ralph Oman, the Register of Copyrights. The Copyright Office is at the front line in the administration of the cable and satellite compulsory licenses. The Copyright Office receives the royalty moneys and deposits them into the U.S. Treasury for later distribution by the Copyright Royalty Tribunal. In accepting cable and satellite operators' statements of account the Office determines whether the correct payments have indeed been made.

Mr. Oman, I gather from your statement that you support the policy of including wireless and other new technologies within compulsory licensing, but suggest that we include them in the satellite section of the law rather than section 111. I am eager to hear from you on that and other subjects. As always, we welcome you to the subcommittee.

Your statement, without objection, will be made a part of the record. We would like you to summarize, if you can, for us because we have read your statement.

Welcome.

STATEMENT OF RALPH OMAN, REGISTER OF COPYRIGHTS AND ASSOCIATE LIBRARIAN FOR COPYRIGHT SERVICES, LIBRARY OF CONGRESS, ACCOMPANIED BY WILLIAM ROBERTS, SENIOR ATTORNEY, AND MARILYN KRETSINGER, ASSISTANT GENERAL COUNSEL

Mr. OMAN. Yes, sir. Mr. Chairman, thank you very much, and members of the subcommittee. This is an opportunity we are grateful for, to testify on H.R. 1103.

Let me introduce William Roberts, one of the senior attorneys on the General Counsel's staff, and the Assistant General Counsel, Marilyn Kretsinger.

Your bill, Mr. Chairman, will permanently extend the section 119 satellite carrier compulsory license. It will also broaden the definition of a cable system in section 111 to include wireless cable as well as a few other new technologies. The legislation is both important and timely, and I look forward to working with you on it in the months ahead.

Mr. Chairman, as I see it, the section 119 satellite carrier compulsory license has been a great success despite some of the grumbling you may hear in the course of the day from some of the network affiliates. Your royalty formula based on a per signal per subscriber basis has been completely vindicated. The cable compulsory license pegs its royalties to gross receipts and obsolete FCC regulations. The satellite royalty formula avoids this error. It is much easier to administer and much easier for the satellite broadcasters to understand and follow. So the satellite carrier license has served the public and the industries very well.

If you extend the satellite license, you will give the satellite broadcasters two valuable assets. First, you will give them more certainty and stability so they can attract investment capital and become more competitive, which is something we are all interested in. Second, Mr. Chairman, you would clarify what I see as a legal thicket that has spawned several lawsuits against the Copyright Office.

As you know, Mr. Chairman, five satellite carriers have sued me in the Northern District of Georgia. They want the court to invalidate our regulation that says the satellite carriers are not eligible for the section 111 cable compulsory license. The district court has recently ruled against the Copyright Office regulation, and the decision of the Government on whether or not to appeal is now in the hands of the Solicitor General.

I think our regulation does have a sound legal basis. Even so, I am aware that strong policy arguments for extending compulsory licensing to all types of broadcast retransmission services are being made, and those arguments are persuasive. But I am bound by the terms of the statute that governs us, and I cannot consider policy arguments. Congress keeps the Register of Copyrights on a very short leash, Mr. Chairman. The FCC can regulate in the public interest. The Copyright Office can't.

By extending the satellite carrier license you would end this principled dustup between the industry and the Copyright Office, and I for one would welcome it. I wish I could support without reservation the other half of the bill, the broadening of the cable compulsory license. Of course, I don't object to what you are trying to do on policy grounds. In fact, I strongly believe that Congress should let all types of new broadcast retransmission services enjoy the same benefits of compulsory licensing that the wired cable industry has enjoyed for so long. I say this especially in light of the silence from some of the copyright owners. Why are we not hearing from the motion picture companies?

In Sherlock Holmes' mystery, Mr. Chairman, "The Hound of the Baskervilles," the famous detective solves the crime when he realizes that the usually noisy dogs for some reason don't bark at the intruder. I wonder today why Jack Valenti isn't barking. The vital interests of his members are at stake here, and he lies silent on the hearth. He must have a larger strategy that will play itself out in time.

It would make more sense, in my view, Mr. Chairman, and especially from the operational standpoint to add the new video providers like wireless cable to section 119 instead of section 111. In that way we could take advantage of the simplified royalty mechanism. As I mentioned earlier, the royalty mechanism in the cable compulsory license is a mare's nest of complexity, complications and uncertainties. Placing new delivery systems like wireless cable, direct broadcast satellite service, telephone companies, and any other services that may emerge down the road within the confines of section 111 will overload an already dysfunctional system.

If you add these provisions to section 111, you might make it more difficult to eliminate the provision in the future, even though it may have outlived its usefulness as far as wired cable is concerned. Then again, I suppose, the argument could be made on the other side, load up an already broken law with new responsibilities and it could collapse from the new stress and strain. Is this why Jack Valenti lies as untroubled and quiet as one of the Baskerville hounds?

The per signal, per subscriber royalty mechanism of the satellite license has been a boon to copyright owner and user alike. It would be disappointing to see the new service providers saddled with all

of the problems of the cable compulsory license. These innovative companies will help us solve a major problem in the cable industry—the lack of effective competition—and Congress should encourage them to succeed and prosper by giving them a regulatory scheme that works.

I realize that placing new retransmission providers within section 119 will pose a few drafting challenges, but I am confident that it is a better solution over the long haul.

Mr. Chairman, I applaud your efforts to place compulsory licensing reform at the legislative forefront, and I look forward to working with you. I would be pleased to answer any questions. Thank you very much.

[The prepared statement of Mr. Oman follows:]

PREPARED STATEMENT OF RALPH OMAN, REGISTER OF COPYRIGHTS AND ASSOCIATE LIBRARIAN FOR COPYRIGHT SERVICES, LIBRARY OF CONGRESS

Mr. Chairman and members of the Subcommittee, I wish to thank you and your staff for the opportunity to appear here today to testify on H.R. 1103. Your bill will extend on a permanent basis the section 119 satellite carrier compulsory license, currently due to expire December 31 of next year, and will also broaden the definition of a cable system in section 111 to include new types of broadcast signal retransmission services such as wireless cable television. Compulsory licensing of broadcast signals is an important and topical issue, and I look forward to working with you on this matter.

For detailed background information about the cable and satellite carrier licenses, I invite the Subcommittee to review my March 1992 Report on these licenses.[1]

TITLE I—SATELLITE CARRIERS

Title I of the bill permanently extends the section 119 satellite carrier compulsory license, as well as making several other technical amendments to the section. Section 119, created by the Satellite Home Viewer Act of 1988, establishes a compulsory license for satellite carriers who retransmit broadcast television signals to satellite dish owners for their private home viewing. The section distinguishes between two different types of broadcast signals: network stations, which include all of the three major commercial networks, and superstation signals, which are the stations of independent broadcasters not affiliated with any of the networks. Copyright royalties are assigned on a per signal, per subscriber basis, with a higher rate charged for superstation signals as compared to network signals. The royalty rates have recently been adjusted in accordance with a ratemaking arbitration procedure prescribed in section 119.

The satellite carrier compulsory license has operated in a smooth and efficient manner since its enactment in 1988. The Copyright Office has collected almost ten million dollars in royalty fees for distribution to copyright owners of retransmitted broadcast programming. A noticeable increase in royalties occurred last year pursuant to the rate adjustment effected by the arbitration panel. I have attached a breakdown of the royalties by accounting period for your information.

The wisdom of Congress in enacting a royalty formula based on a per signal, per subscriber basis has certainly been validated through the five year operation of section 119. Unlike the section 111 cable compulsory license, which calculates its royalties based on a complicated formula involving gross receipts of the cable operators and old, outdated FCC regulations, the section 119 royalty formula has proven easy for the Office to administer and easy for the affected parties to understand and follow. In short, I think that it is safe to say that from an operational standpoint, section 119 has been an unqualified success.

With the slated expiration date of section 119 looming in the near future and the resultant uncertainty, the Copyright Office has become embroiled in litigation with satellite carriers over their potential eligibility for the section 111 cable compulsory license. This litigation actually has its origin in the series of events that led to passage of the Satellite Home Viewer Act in 1988. To summarize briefly, during the mid-1980's, the Copyright Office began to receive statements of account and royalty

[1] Report of the Register of Copyrights, "The Cable and Satellite Carrier Compulsory Licenses: An Overview and Analysis" (March 1992).

payments from satellite carriers serving the home dish market claiming that they were cable systems under section 111. The receipt of these royalties, along with those received from MMDS operators (a.k.a. wireless cable) and satellite master antenna systems (SMATV's) prompted the Copyright Office to open a proceeding to consider their eligibility for the section 111 cable license. While this proceeding was pending, the National Broadcasting Company (NBC) filed suit against a satellite carrier that was intercepting NBC's signal and retransmitting it to its subscribers. The District Court ruled in NBC's favor, finding that Satellite Broadcast Networks (SBN) was not a cable system within the meaning of the section 111(f) definition because its facilities were not located in a single state. *Pacifc Southern Co. Inc.* v. *Satellite Broadcast Network. Inc.,* 694 F. Supp. 1565 (N.D. Ga. 1985). Congress then passed the Satellite Home Viewer Act which created a new statutory license for satellite carriers.

Subsequent to the District Court's decision and passage of the Satellite Home Viewer Act, the Copyright Office issued a Notice of Proposed Rulemaking in which the Office concluded that satellite carriers were not cable systems for purposes of section 111. 56 FR 31580 (1991). The Office endorsed the finding of the District Court, and did not offer much more in the way of reasons why satellite carriers were eligible for cable compulsory licensing, although such reasons clearly did exist. This occurred in no small part due to the Office's understanding that the parties had settled the case in light of the enactment of the section 119 license in 1988. Much to the Office's surprise, two months after the Notice of Proposed Rulemaking, the Eleventh Circuit issued its opinion, reversing the decision of the District Court and holding that satellite carriers were cable systems within the meaning of section 111(f). National *Broadcasting Co. Inc.* v. *Satellite Broadcast Networks. Inc.,* 940 F.2d 1467 (11th Cir. 1991).

The Copyright Office analyzed the decision of the 11th Circuit very closely, and issued a Final Regulation in January of 1992. 57 FR 3284 (1992). The Office again concluded that satellite carriers were not eligible for the cable license, especially considering their completely illogical fit into the statutory royalty scheme. This decision is slated to go into effect on January 1, 1994, at which time the Office would refuse any filings from satellite carriers, and MMDS operators, claiming the section 111 cable compulsory license.

This Final Regulation involved a difficult decision, but it is one that I think has a sound legal basis. While I agree that there are strong policy considerations favoring extension of the cable license to wireless cable, satellite carriers, and other video broadcast retransmission services, and I would support such an extension, Congress has not authorized the Copyright Office to make such decisions based on policy grounds. We have the task of following the letter of the law as Congress wrote it, and I have concluded that the 94th Congress, which passed the Copyright Act of 1976, did not envision or intend systems such as satellite carriers and wireless cable to qualify for section 111 compulsory licensing.

Satellite carriers and wireless cable operators argued that the words "other communications channels" appearing in the section 111(f) definition of a cable system was "clear" evidence that the 94th Congress intended their inclusion within the cable compulsory licensing scheme. The meaning of "other communications channels," however, is far from clear, and section 111 read as a whole reflects no intended inclusion. The FCC rules and regulations which form the fulcrum of the royalty fee mechanism did not, and do not, apply to satellite carriers and wireless cable. Such things as the 1976 must carry rules, the distant signal carriage rules, and the syndicated exclusivity surcharge have no application whatsoever to satellite carriers or wireless cable, and it would make a mockery of statutory principles to pretend that they did. Everything about the structure and operation of section 111 demonstrates an intention that it only applies to the wired cable industry as it was subject to FCC regulation in 1976. The principles of statutory construction, therefore, as well as a decent respect for the congressionally imposed limits on my authority, mandated the Office's decision.

The satellite carriers obviously disagreed with the Office regulation and, holding in their hand the *SBN* decision, brought the Office into court in the Northern District of Georgia. On January 26, 1993, the District Court ruled in the satellite carriers' favor, refusing to listen to our arguments on the theory that the 11th Circuit had already decided the issue. The case is now in the hands of the Solicitor General's Office as to whether or not the government will file an appeal.

Permanent extension of section 119 will terminate the need for continued litigation between the Copyright Office and satellite carriers because the carriers will have their own, specific license without need to resort to the cable compulsory license. Extension will also provide the satellite carrier industry with increased security, assuring them of a continued, viable copyright license, and increasing their

ability to attract investment capital. Quick action on the bill will guarantee the satellite carriers' position as a strong and significant competitor of cable and allow both the satellite carrier industry and the Copyright Office to avoid further litigation.

With respect to the technical amendments to section 119, I have a few technical points that I wish to bring to your attention. First, with respect to the duration of the mandatory rate-setting arbitration proceeding described in § 119(c)(3)(E), I would recommend that the time period within which the arbitration panel has to hear the parties' cases and render its decision be increased from 60 days to 180 days. There appears to be a general consensus that the panel proceeding which took place in 1991 was on too fast a track, thereby not allowing the participants enough time to thoroughly present and argue their cases, as well as forcing the arbitration panel to rush forward with a quick decision. The 180-day time frame will allow for a less harried proceeding, and is also consistent with the provisions for arbitration panels in H.R. 897.

Second, I recommend preservation of the formal voluntary negotiation provision of subsection (c)(2)(A), which is eliminated by the bill. Although none of the parties reached voluntary rate agreements during the 1991 proceeding, it must be recalled that this is the first time that carriers and copyright owners ever had to negotiate a rate. There was therefore significant incentive to "wait and see" how the arbitration proceeding might turn out, with both sides hoping that the results might substantially favor their position. It is possible that future rate adjustments might find at least some parties less willing to submit to arbitration. While elimination of subsection (c)(2)(A) does not foreclose the possibility of voluntary agreements at any time, the continued existence of a formal negotiation period would seem to provide at least some added incentive for the parties to sit at the table and bargain. Such negotiations could promote more widespread settlement and obviate the continued need for arbitration of the rates every 5 years.

TITLE II—SECONDARY TRANSMISSIONS BY CABLE SYSTEMS

Title II of the bill amends the definition of a "cable system" appearing in section 111(f) by replacing it with a broader definition intended to permit other types of broadcast retransmission services beside traditional wired cable access to the section 111 cable compulsory license. As a condition to this increased access, the bill apparently intends to require all video providers claiming the cable license to adhere to the FCC cable regulations encompassed within current section 111.

As it now stands, the language in section 201(b) of the bill actually makes the FCC rules on the date of enactment of this bill applicable to the royalty formula, which would dramatically alter the current royalty formula and the total fund. In fact, computation of the royalty would be difficult since the FCC has no distant signal carriage rules in 1993. At a minimum the language in section 210(b) of the bill abolishes the 3.75% rate for additional distant signals. H.R. 1103 should specify that all broadcast retransmission services claiming section 111 eligibility must comply, for copyright purposes, with the applicable FCC rules from April 15, 1976, October 19, 1976, or June 24, 1981, which are the key dates.

1. New Cable Systems

In the March 1992 "Cable and Satellite Carrier Compulsory License Report," the Copyright Office described a number of legislative options for amendment of section 111. First and foremost among these suggestions was to simplify the royalty fee mechanism of the cable license. The current mechanism, which is based on obsolete, outdated, and overruled FCC rules that applied to the cable industry as it existed in 1976 (i.e. traditional wired cable), has long become an archaic beast that produces results at odds with logic and sound copyright policy. Cable systems often incur high per signal royalty rates based on FCC market surveys of twenty years ago which have no reality in today's video marketplace. Broadcasters are denied access to many cable markets because of high copyright fees, despite the fact that such broadcasters must compete for advertising with other broadcasters in the same markets that are carried by cable systems for free. For example, in the state of New Jersey, the FCC's obsolete rules allow cable systems in some counties to carry all New York City and Philadelphia broadcast stations without copyright charge, while New Jersey cable operators in neighboring counties must pay royalties for all of the Philadelphia signals.

Despite the fact that the FCC has long ago jettisoned its cable television carriage and must carry rules, the rules continue to clank onward for copyright purposes. The result is a system with marked inequalities, inefficiencies, and illogic, which worsens every year as the old FCC rules and the reality of the marketplace diverge to an increasing degree.

As part of the discussion of a simplified royalty fee mechanism, the Office Report suggested a per signal, per subscriber fee solution similar to that currently found in section 119. Not only is a flat per subscriber fee easier to calculate, but it would provide far greater certainty and accuracy than the current royalty fee structure. The Copyright Office and the courts would no longer be called upon to reinterpret long dead FCC rules, and cable operators would pay uniform royalties according to clear cut guidelines, as opposed to rules whose interpretation is murky and capable of several variations.

As discussed above, it may be difficult from a policy (as distinguished from a legal) standpoint to exclude satellite carriers and wireless cable systems from the section 111 license. However, the principal statutory provisions that legally forced the Copyright Office to arrive at its conclusion were the royalty provisions of the cable license. It simply did not make statutory or logical sense to apply the royalty mechanism to these operators. Placing new types of broadcast signal retransmission services within section 111 imposes burdens that the royalty mechanism was never intended to bear. For example, telephone companies providing retransmission service are subject to an entire body of FCC regulation related to the telephone industry. These regulations may be in direct conflict with old FCC rules related to the cable industry, and this discrepancy creates enhanced potential for anomalous results. Another example is direct broadcast satellite service (DBS), which is soon to begin operation and resembles satellite carriers. The old FCC cable rules incorporated by Congress into the Copyright Act are directed toward localized retransmission facilities, with copyright liability hinged on distant versus local broadcast signals. How can a nationwide retransmission service abide by these localized rules? How much should they pay for their retransmitted signals? All these questions admit of no easy answers, and will require the Copyright Office to once again interpret the application of a body of rules that were never intended for these purposes.

The Copyright Office would therefore favor inclusion of new broadcast retransmission services such as wireless cable into the provisions of section 119, thereby taking advantage of the simplified fee mechanism. The Office acknowledges that there are some technical difficulties to overcome to achieve this result, such as how to address the white area provisions of section 119, but a mutually agreeable solution can certainly be achieved. Such a move would not only greatly simplify compulsory licensing for all parties involved, but would also be a major step in bringing such licensing into the reality of today's marketplace.

2. Contiguous Cable Systems

Aside from amending the section 111(f) definition of a cable system to include other types of video retransmission services in addition to traditional wired cable, the bill also eliminates the language in the current Act which defines when two or more cable systems are considered as one for copyright royalty purposes. This language, generally known as the "contiguous communities" provision, currently provides:

> For purposes of determining the royalty fee under subsection (d)(1), two or more cable systems in contiguous communities under common ownership or control or operating from one head-end shall be considered as one system.

The notion of a few large cable operators deliberately fragmenting their systems so as to avoid paying higher copyright fees is still a valid one, as long as the Act sets different royalty rates for small and large cable systems. The Copyright Office therefore favors preservation of the contiguous communities concept, but with some modification to adjust for the inequalities of the current provision.

The contiguous communities provision has produced two significant difficulties in this era of vertical integration and rapid acquisition and merger of cable systems. First is the problem of phantom signals. "Phantom signals" occur principally in the acquisition and merger scenario when two or more cable systems serving different contiguous communities with different broadcast signal complements come under common ownership. Because the systems now must pay copyright royalties as if they were a single cable system, the operator must pay for all of the distant broadcast signals previously carried on the separate systems as if they are carried throughout the entire new single system. The result is that the operator must include in its gross receipts subscribers who, in many cases, do not even receive the distant signal for which the operator pays. The matter is further complicated when the new single cable system spans a large geographic area which, in accordance with old FCC rules, has several different complements of permitted distant signals. The expense of the "phantom signal" problem has forced a number of cable operators to drop long-carried distant signals valued by subscribers in certain communities merely to avoid incurring a substantial copyright fee.

The second significant problem with the current contiguous communities provision is its propensity to force integration without a valid purpose. Two cable systems are considered "contiguous" when they share a common political boundary. This has often produced anomalous results that undercut the intention of the provision. For example, two cable systems on opposite sides of a mountain range but under common ownership are considered one system, even though they have no operational connection with one another other than common ownership.

The Copyright Office recommends several possible changes to the current "contiguous communities" provision to correct the above described problems. With respect to the 'phantom signal" problem, it could be made clear that the contiguous communities provision only applies in determining whether to file as a category one, two, or three system. Systems would be aggregated in accordance with their location in contiguous communities for purposes of determining which statement of account form, and corresponding royalty rates, should be used. Thus, for example, two once separately owned contiguous systems, each with gross receipts less than $292,000 and using the SA 1–2 statement of account form, which come under common ownership would aggregate their gross receipts and, if they exceeded $292,000, both systems would use the SA–3 statement of account form (and applicable distant signal rate formula) to calculate their royalty payments, but would otherwise continue to file separately based on the subscribers they actually serve.

Another possible solution to phantom signals is to amend the "contiguous communities" provision to provide that two or more cable systems are considered as one for choice of form purposes if they are in contiguous communities under common ownership or controlling operating from the same headend. This would reduce the overall total of contiguous systems, especially in the merger and acquisition context, since separately built systems tend to have their own headends. Either or both of the legislative amendments would go a long way towards solving the "phantom signal" problem.

A third legislative option is to clarify the meaning of the term "communities" appearing in the "contiguous communities" provision. The current practice of observing political boundaries has produced the "mountain range" anomalies described above. Use of the FCC definition of a "community" would be more advantageous since the definition is far more confined and tailored to the geographic area actually served by a cable system.

Mr. Chairman, the Copyright Office understands and can support the proposals to provide a compulsory license for new video retransmission providers and permanently to extend the section 119 license for satellite carriers. I believe, however, that the interests of all parties would be best served if the new video providers are placed within the confines of section 119, so as to take advantage of the simplified fee mechanism, rather than the archaic royalty formula of the section 111 cable license. The Copyright Office stands ready to assist in this process. Of course, the Office considers that phased elimination of the cable and satellite carrier licenses remains the ultimate legislative solution.

LICENSING DIVISION DAILY REPORT OF RECEIPTS, MARCH 12, 1993

Satellite carriers year/period	Total deposits	Last deposit	
1992/2	$3,283,614.31	02-25-93	
1992/1	$2,598,879.32	08-03-92	$5,882,493.63
1991/2	$1,921,990.44	03-06-92	
1991/1	$1,741,464.97	08-02-91	$3,663,455.41
1990/2	$1,639,662.03	05-14-91	
1990/1	$1,515,974.06	07-31-90	$3,155,636.09
1989/2	$1,334,880.11	08-30-90	
1989/1	$1,088,677.39	08-01-89	$2,423,557.50
Total satellite distribution	$9,919,526.85	01/12/93	

Mr. HUGHES. Well, thank you very much, Ralph. Frankly, I don't spend very much time trying to figure out where people are, as I would spend much of my time trying to anticipate. But I suspect the hounds are not barking because they might be comfortable with what we are doing. I find generally that this includes Jack Valenti. If he has got some major concerns he is not very timid about communicating those to us.

Mr. OMAN. As Mr. Moorhead observed 2 weeks ago, he is not a shrinking violet.

[Laughter.]

Mr. HUGHES. That is true. I have a few questions of you.

First of all, as I understand it, the circuit court did hand down an opinion back in September on the issue of whether or not satellite carriers and cable systems are eligible for section 111, and that holding was right on target. It basically held, as I understand, that SBN in that particular case was a cable system within the meaning of section 111.

Now, as I understand, and you can correct me if I am wrong, that even though that circuit opinion, which I presume you would agree is law—a circuit opinion is law—the concern was then raised that it was not a decision within the context of the Administrative Procedure Act, and that was an invitation to challenge it directly and make the Copyright Office a party defendant.

Now, was any thought given to filing an amicus brief, first of all, in the matter that was pending before the circuit court. Because as I understand it, the circuit court did take notice of the fact that a proposed notice of rulemaking was then in existence dealing with that very issue.

Was any thought given to filing an amicus brief to argue the matter before the circuit court?

Mr. OMAN. At the time, we were in the midst of the proceedings to, if my recollection is correct, enact the section 119 compulsory license, and I think many of us anticipated that the issues raised in the suit would be mooted by the legislative granting of the compulsory license. I should note that the circuit court was very explicit in saying that its ruling applied only to the case at hand, did not apply to any prospective rulemaking that the Copyright Office was engaged in. And we felt that the court did not have our views before it. We did not request the opportunity to file an amicus brief, thinking that a brief wasn't necessary at that point.

Mr. HUGHES. You felt that it would be mooted and it wasn't necessary to file an amicus brief because of the events in the Congress dealing with the compulsory license?

Mr. OMAN. Yes, sir. And we were surprised when 2 months after the legislation passed I was sued for the regulation——

Mr. HUGHES. Now, that brings us to where we are now.

Mr. OMAN. Yes.

Mr. HUGHES. As I understand it, the litigation situation is that you are considering now appealing a district court Administrative Procedure Act opinion holding that satellite resale carriers are cable systems within the meaning of section 111.

Mr. OMAN. I think the district court said that they could not go behind the circuit court ruling and they were bound by stare decisis. I think there is the strong opinion in the administration that that decision of the district court was technically flawed, and that may weigh heavily in the decision of the Solicitor General.

Mr. HUGHES. Isn't the best you can hope for is a decision by the eleventh circuit to hear the matter en banc after the panel affirms? What purpose is served by making SBN now pay for yet another stage of litigation that began in 1987? Isn't that really the case? Isn't that the most you can hope for?

Mr. OMAN. I suppose it could be reversed en banc. It could be reversed by the circuit court without resorting to an en banc proceeding, if, in fact, they determine that the lower court didn't have all of the information before it at the time and that the circuit court's earlier decision in SBN was, in fact, not determinative of the court's findings in the subsequent rulemaking by the Copyright Office.

Mr. HUGHES. Have you recommended to the Solicitor General that the district court's ruling be appealed at this point?

Mr. OMAN. We have given an exhaustive list of pros and cons, and it is a long list. We have not formally submitted our documents to the Solicitor General. But we have had some tentative discussions, and the Justice Department was more concerned about the procedural points than we were. As a matter of fact, it wasn't something that we had even thought about, but, because of his special perspective, it is something the Solicitor General is very aware of—the procedural reasons for upholding a prior court decision. That factor may weigh more heavily in his decision in the end than any of our recommendations, pro or con.

Mr. HUGHES. So, in essence, what you are saying is, number one, you do not feel that the matter was basically addressed in the district court decision because it just was decided on the basis of stare decisis, and you did not have an opportunity to present the Copyright Office case, and you did not do that initially because you felt that it would be mooted.

When do you expect this matter to be resolved? Because I share Rick Boucher's opinion. I think the initial Copyright Office decision was very questionable. As I have indicated many times, I think the Copyright Office viewed the language very, very restrictively—overly restrictive. As a matter of policy, it would appear as if even you agree at this point that it is probably good law and for all kinds of reasons to ensure that cable and satellite transmissions survive and be competitive as a media to deliver signals—programming.

Mr. OMAN. In fact, it will be extremely difficult to implement the court's decision because of all of the deficiencies in the current cable compulsory license, but I have made reference to the fact that the cable license relies on outdated FCC regulations that no longer are in existence, and the whole regulatory scheme in section 111 did not contemplate direct broadcast satellites or any other new technologies that have since emerged.

In answer to your question, the Solicitor General has to make his decision within the next couple of weeks and we should find out at that point. And I should add that our recommendation is only one factor that the Solicitor General considers. So we could strongly recommend filing an appeal and the Solicitor General could say no. We could say no and the Solicitor General could decide to appeal. They have complete discretion.

Mr. HUGHES. I understand. Well, we have a vote in progress. Why don't we recess for just a few minutes while we catch that vote. We will be right back.

The subcommittee stands in recess.

[Recess.]

Mr. HUGHES. The subcommittee will come to order.

Before the vote, Ralph, I think you indicated that abiding by the SBN district court decision would cause some administrative problems. But isn't it a fact that from 1986 to the first part of 1989 when section 119 kicked in, satellite carriers filed with you under section 111? Isn't that a fact?

Mr. OMAN. That is a fact. In many cases we didn't know that they were satellite carriers initially, but they became so well-known and their operations so clearly understood that we knew from then on that they were satellite carriers.

Mr. HUGHES. Well, did it cause insurmountable administrative problems, the fact that they filed?

Mr. OMAN. It wasn't insurmountable. We did the best we could, but it created a lot of inequities, a lot of uncertainties, and it really was not a good fit.

Mr. HUGHES. But that is because of the interpretation of the law as to whether they were a cable system.

Mr. OMAN. No. It was because the regulatory regime depended on some FCC regulations that had been in place in 1976 but had since been outdated and in some cases overturned. I am talking about must carry, distant signal regulations. These FCC rules have no practical application to satellite carriers.

Mr. HUGHES. I have some additional questions, but my time is up. We will have another round.

The gentleman from California.

Mr. MOORHEAD. Well, thank you, Mr. Chairman. I want to welcome you, Mr. Oman, here this morning.

We usually agree on the actions of the Copyright Office, but this is one that we probably don't agree with as far as wireless cable is concerned. I think it is necessary, if we are going to have competition, that we at least put the wireless people on the same basis that we have all over cable. And I don't think that Mr. Valenti would complain about having a system that was balanced and works. He doesn't like the compulsory license, obviously. But we have screwed that up very badly in legislation that was placed last

year, you know that, and to some extent the system needs to be changed. But I don't think a true correction or a true change is going to come about by leaving some in, some out. You have got to at least be fair.

What would your comment be on that?

Mr. OMAN. I would agree 100 percent, and I think this legislation does move in the direction of fairness and I hope that we can resolve the matter as quickly as possible to give this up-and-coming industry the certainty and predictability it needs to prosper in the years ahead.

Mr. MOORHEAD. I think that last year the chairman of our subcommittee and the chairman of the full committee and I had legislation that would try to help some of the copyright problems here, but it didn't go very far after it got out of the committee. But maybe somewhere down the line we will take another look at it.

Title II of H.R. 1103 and H.R. 759 take a little different approach to making wireless cable a part of the compulsory license. Is one approach in your mind preferable to the other?

Mr. OMAN. We, of course, have our preferences. Moving the compulsory licenses for the new technologies into the section 119 compulsory license section and out of section 111 would be the preferred solution. The benefits in terms of cost and calculation of the royalties and the ease of administration are considerable. But given the choice of using the approach in H.R. 759 or H.R. 1103 within the context of section 119, I probably would prefer the solution that is suggested in H.R. 1103 since it encompasses all of the new broadcasting technologies as opposed to being focused exclusively on the wireless cable industry.

Mr. MOORHEAD. In title I of H.R. 1103 concerning the duration of mandatory ratesetting arbitration proceedings, presently the arbitration panel has to hear the parties' cases and render its decision within 60 days. You recommend increasing that to 6 months. Isn't that a big long as far as the time that would be required? Do you really need that much time?

Mr. OMAN. Well, we were thinking of making it compatible with the arbitration period that Mr. Hughes included in the Copyright Reform Act of 1993, which was 6 months. Perhaps that is a little long. We felt that the 60-day, 2-month period was just a bit too short. The last time the arbitration panel went through that procedure they felt rushed and they weren't able to adequately consider the evidence. They would have liked to have had more time.

Maybe a compromise would be possible of, say, 4 months. But just a little bit more time than the 60 days, which was difficult to cope with.

Mr. MOORHEAD. As we go along the line in this area your valuable counsel will be important to us, and if you have any ideas that you would like to present, I know that the chairman and I would both welcome them.

Mr. OMAN. We look forward to working with you, Mr. Moorhead. Thank you.

Mr. HUGHES. The gentleman from North Carolina.

Mr. COBLE. Thank you, Mr. Chairman. Mr. Oman, good to have you all with us.

Mr. Oman, have you read Mr. Hargrove's statement, written statement? Have you had a chance to read it?

Mr. OMAN. I have not had the chance.

Mr. COBLE. OK.

Mr. OMAN. We got them this morning at 9 o'clock and we paged through them——

Mr. COBLE. OK.

Mr. OMAN [continuing]. And pulled out some of the salient points. But I have not actually sat down and read it.

Mr. COBLE. I am going to read just a few words from his statement that caught my attention and I would like to have your response. Now, perhaps those who more directly represent the broadcasting industry may be in a better position to respond than you, but I think your comments would be vital to us.

I read from his statement: "I regret to report that the Home Satellite Viewer Act has not been as successful in achieving its intended objectives as many had hoped. The 'white area' exception has proved to be extremely difficult and excruciatingly expensive for affiliates to administer. While we understand the natural inclination of satellite carriers to expand the reach of their customer base, their failure to cooperate fully with local affiliates in monitoring and assuring compliance with the act's 'white area' restrictions has been disappointing."

And finally, "While coping over the last 4 years with the satellite delivery of broadcast network programming has, in the main, been a colossal nuisance, the stakes for the future are much higher."

Now Mr. Hargrove in typical Carolina style has not sugarcoated his views. I am interested in your comments.

Mr. OMAN. I think there are isolated pockets of problems that we have to focus on and try to improve in the years ahead. Four years is really a very short time for a very ambitious regulatory scheme to be implemented across the country, and there are going to be occasionally recalcitrant participants, but I think we have to look at the overall nationwide trends. And I would again defer to the comments of the people with direct knowledge of the industry, but it is my understanding based on my limited discussions that the trend is toward compliance, the trend is toward eliminating unnecessary bureaucracy, and the industry is eliminating some of the noncompliance problems that had plagued the industry over the years, and I think that in the next few years a lot of the problems that Mr. Hargrove makes reference to will be changed, just because this is becoming a more widespread technology and the rules and regulations are becoming more widely known.

Let me ask my assistant, Mr. Roberts, to add to that, if I may.

Mr. ROBERTS. As the Register indicated, we haven't really had time to look at Mr. Hargrove's statement. I would say, however, that the problem really seems to be with lists of subscribers that are submitted to the networks to identify who exactly is receiving the signals and where their particular location is. We at the Office receive those subscriber lists on a periodic basis and we don't have any authority to verify or examine those lists, but if in the wisdom of the Congress that is what we should do, I am sure that we would be willing to help along those lines.

Mr. COBLE. Thank you. Although voluntary negotiations probably did not work as well as they could have under existing law, you recommend retaining it. Is there any way we can provide an incentive for the parties to use voluntary negotiations?

Mr. OMAN. Mr. Coble, the fact that there weren't voluntary negotiations in the first go round, perhaps, shouldn't come as too much of a surprise. The parties involved resorted to the arbitrators thinking that they might come out better than they would as a result of voluntary negotiations. Now that we have the initial rulings of the arbitrators and they are living with the results, I suspect that in the next go round they might be more willing to submit to voluntary negotiations than they were the first time around, so that is why we favor keeping that option in the legislation.

The fact that they have reached an accommodation of sorts after the first round of arbitration suggests that maybe the next time they will resort to the voluntary negotiations amongst themselves.

Mr. COBLE. I thank you.

Mr. OMAN. It saves them money. It saves them money and that is the greatest incentive, I think, to the voluntary arrangements. I would not think that another incentive or inducement to encourage them to resort to the voluntary negotiations would be necessary because it is a very powerful incentive, and that is it takes money out of their pocket to invoke the time-consuming and expensive arbitration process.

Mr. COBLE. Thank you, Mr. Oman. I have no further questions, Mr. Chairman.

Mr. HUGHES. The gentleman from California, Mr. Edwards.

Mr. EDWARDS. Thank you, Mr. Chairman. I have no questions.

Mr. HUGHES. The gentleman from Florida. The gentleman from Rhode Island.

Mr. REED. Mr. Oman, just a quick question. Your testimony indicates that you would prefer to see wireless cable placed in section 119 rather than in section 111, and you seem to, in fact, say that the difference is really the ratesetting process—the feesetting process.

Are there any other differences that you would from your perspective see from placing wireless cable in section 119 versus section 111? Is it simply just the ease of setting rates and fees?

Mr. OMAN. The whole system of regulation is different under section 119 than it is under section 111. Under section 111 they take a percentage of the gross receipts of the company, factor that in with some outmoded FCC regulations that no longer have any direct bearing in the real marketplace, and come up with a fee that is in many ways unfair to a lot of people.

In the section 119 compulsory license there is a simple, straightforward solution to the problem and that is charging them for the number of subscribers and the number of signals they use. This accomplishes not just ease of administration of the royalty, but it is a predictability on the part of the companies being able to estimate how much their liability is going to be, and thereby make investment decisions based on that anticipated liability. It is just a more sound and reasonable way to proceed, in my view.

Mr. REED. But you wouldn't foresee any operational impediments being in section 119 versus section 111 or any questions of sort of an even playing field to compete with cable systems?

Mr. OMAN. I think that we have heard some suggestions today that the section 111 cable compulsory license might be an endangered species. Perhaps in long-term certainty and investment decisionmaking, the section 119 compulsory license, which promises to be around for a long time, may be the better way to go operationally from the point of view of the wireless cable companies and others.

Mr. REED. Thank you, Mr. Oman. Thank you, Mr. Chairman.

Mr. HUGHES. Well, let me just ask you, if section 111 is unfair—and I agree that it is ridden with problems such as the rate structure—why isn't it unfair to the cable and to copyright owners, who have not complained?

Mr. OMAN. The cable copyright owners, meaning the——

Mr. HUGHES. To cable systems and to copyright owners.

Mr. OMAN. Oh. The copyright owners have complained about section 111. I remember a former Senator from Minnesota once, being asked to comment on something, saying, "How do you criticize an accordion concert? Where do you start?"

Mr. HUGHES. He was just kidding.

[Laughter.]

Mr. OMAN. There are just so many problems with it that you can't complain about this or that. The whole thing is flawed.

Mr. HUGHES. I agree. And let me just pick up on it there, pick up on what Mr. Reed was alluding to, and I suspect that your concern about whether it should be in section 111 or section 119 is because of the problem-ridden rate structure in section 111. If that is the case, could your current concerns be addressed by reforming the rate structure of section 111 instead of, as you now suggest, placing the new technologies in section 119, which has other problems which we will get into.

Mr. OMAN. Mr. Roberts has been working on that problem for some time, and let me ask him to field the question.

Mr. ROBERTS. Good morning, Mr. Chairman.

Mr. HUGHES. Good morning.

Mr. ROBERTS. We would dearly love to see a complete reform of the section 111 royalty formula. The Register indicated there have been many problems. We have files and files of letters from cable operators complaining about the inequalities of the way it currently operates. Reforming the royalty structure would eliminate the vast majority of those complaints, and we are certainly in favor of working toward that.

Mr. HUGHES. Why don't we do that? Because, as you know, the decision we made in the legislation to place new technologies in section 111 instead of section 119, because I think you discussed it with my staff, was based in part upon concern regarding application of the white areas provisions to these new technologies that would be covered under section 119. Don't we create other problems?

Mr. ROBERTS. We favor a reform of section 111. The principal reason we suggested putting it in section 119 is really to take ad-

vantage of that royalty mechanism, and it was kind of the lesser of two evils.

Mr. HUGHES. How do you deal with the white area problem?

Mr. ROBERTS. I think with the white area problem we have to make it clear that those white area provisions apply only to satellite carriers and not other types of new broadcast retransmission systems. The white area provisions would not necessarily apply to those other types of new providers such as wireless cable, for instance.

Mr. HUGHES. Well, would you limit wireless cable's retransmission of network signals only to households unserved by over-the-air broadcasts.

Mr. ROBERTS. At this point in time, I don't see a particularly strong need to do that, and that is why we would recommend carving out the other types of new providers such as wireless from the white area provisions, because they really don't have direct application.

Now, Mr. Boucher made an excellent suggestion about clarifying the definition of a satellite carrier to include other types of new systems such as DBS. We think this is a particularly advantageous way to characterize between types of systems, those that are satellite based and those that are terrestrially based, and we feel that is an excellent suggestion and perhaps the way to proceed in this area.

Mr. HUGHES. Well, I think that might be a good suggestion too, but let's get back to section 111. Wouldn't it make more sense to reform the rate structure, much as we did in, basically in reform legislation dealing with compulsory license last year——

Mr. ROBERTS. Absolutely.

Mr. HUGHES [continuing]. Instead of attempting to carve out exceptions and attempt to deal with other side problems that are going to occur.

Mr. ROBERTS. Absolutely.

Mr. HUGHES. I mean, frankly, I think the best solution is the one that is going to be offered in the not-too-distant future by Mr. Padden and others. The answer is what we were trying to do in the last Congress, but that noble idea, unfortunately, did not go anywhere. But it seems to me what we need to do is to try to fix some of the problems in the interim. I still believe that phasing out compulsory license is ultimately the answer so we have a level playing field. I am not sure when that is going to occur, and we now have a specific problem with regard to wireless and satellite transmission.

So, if the problem in section 111 deals with the manner in which the rate structure is structured, and I agree with that, then it seems to me we ought to be working together to try to fashion a rate structure that makes sense and not create the side problems. We do that by putting it over in section 119.

Isn't that something we can work to do?

Mr. ROBERTS. I think we would be more than happy to do that.

Mr. HUGHES. You also note the issue of the applicability of FCC rules raised by section 201(b) of H.R. 1103. We have also discussed that issue with copyright owners and other affected interests. As you may be aware, the purpose of 201(b) of H.R. 1103 is to create

a level playing field for all. That is what we are trying to do with the technologies. However, some of these technologies are not subject, at least directly, to FCC rules. That is a part of the problem. That creates additional problems.

For example, for purposes of rate adjustments under section 801(b)(2)(B) of title 17, it is unclear how the CRT, or if H.R. 897 passes, how ad hoc arbitration panels in their place would be able to adjust rates for wireless cable systems as a result of changes in FCC rules that do not apply to them. We have had some constructive comments from the Motion Picture Association of America on this. How would you handle that particular problem?

Mr. ROBERTS. Well, of course the bill as written applies the FCC rules that were in effect April 15, 1976, to new systems. I foresee there being a lot of difficulties with doing that because, after all, we are talking about FCC regulations that did apply to the wired cable industry at that point in time 15 years ago, and we are attempting to place new systems within those confines. It is one thing to pretend for copyright purposes that those rules applied, but it is another thing completely to actually go out and apply those rules.

As you suggested earlier, reforming the royalty mechanism in section 111 would obviate the need for applying the old FCC rules to the new operators.

Mr. HUGHES. Well, that is another reason why we should be, perhaps, working together to do just that. I just have one final question.

The issue of contiguous communities you raise in your testimony, Ralph, presents some very interesting drafting problems. For instance, how would you deal with a situation where programming is delivered via fiber optics from a regional center to a local telephone company? There wouldn't be a headend like there is for a cable system, would there?

Mr. OMAN. There wouldn't be in the technical sense and that would present a difficulty. We have not had anyone from the telephone companies come in and claim that they were eligible for the cable compulsory license—at least not yet.

Mr. HUGHES. It is coming.

Mr. OMAN. I think it would—and Mr. Roberts will answer your technical question about the difficulty of the contiguous areas issue, but let me just say in a preparatory way that these are problems that we will have to deal with in the years ahead because I do think that Ma Bell and the Baby Bells are going to try to shoehorn themselves into the section 111 compulsory license.

Mr. HUGHES. One of the suggestions we have heard is to refer to two or more cable systems in contiguous communities under common ownership or control or operating from a single control center, by way of definition. What do you think of that?

Mr. OMAN. If the motivation is straightforward and not an attempt to limit liability by fragmenting the system, then certainly it is something that we would look at.

Mr. HUGHES. That is another problem.

Mr. OMAN. It is another problem. But let me ask Mr. Roberts to comment on the contiguous communities.

Mr. ROBERTS. I think we would favor broader language. Headend, of course, is a term of art and probably in the context of the phone companies it wouldn't apply. So there is a need to expand that particular definition. It is just another example of how tailored section 111 is to what the cable industry was in 1976.

Mr. HUGHES. That is why I think it is important for us to try to work together and reform some of these sections to try to accommodate evolving technologies and the problems they are going to create.

Mr. OMAN. That has been our view for many years, Mr. Chairman, and we do hope that we will be able to work with you in solving the problem. Deep down we think that this is such an important issue that Congress should shape the outcome or shape the proposed sea change, which will be profound on the industry, rather than stand by and allow it to happen willy-nilly through action of the courts or regulation of the Copyright Office, and we look forward to working with you.

Mr. HUGHES. Let me assure you that we need your help. You have unquestionably the expertise to solve these problems. You have an office that is professionally managed. You have the expertise to help us work through these problems, and I don't know what some of the answers are to some of the questions we have raised. I suspect, though, instead of tinkering around the edges to try to avoid an unfair, problem-ridden rate structure in section 111, that we ought to be attempting to fix that and still look toward the time when we can phase out the compulsory license. But nobody can tell when that is going to be, and we need to deal with the immediate problems. So we look forward to working with you to try to solve those problems.

Mr. OMAN. We look forward to it, too.

Mr. HUGHES. Thank you very much. We appreciate your testimony, Ralph.

I note that we have some videoing going on. The Chair has received a request to cover this hearing in whole or in part by television broadcast, radio broadcast and still photography, or by other similar methods. In accordance with committee rule 5(a), permission will be granted, unless there is objection.

Is there objection?

[No response.]

Mr. HUGHES. Hearing none, permission is granted.

Our first panel this morning consists of Charles C. Hewitt and Janet L. Foster.

Mr. Hewitt is the president of the Satellite Broadcasting and Communications Association, the national trade association for the satellite broadcasting industry. Previously Mr. Hewitt served as corporate counsel for Fairchild Industries and executive director of the National Space Institute, where he worked with scientists such as Dr. Werner von Braun among others.

Ms. Foster is the president of PrimeTime 24, which distributes ABC, NBC, and CBS programming to more than 45,000 home satellite dish owners throughout the country. Before joining PrimeTime 24 as executive vice president of operations, she served with Group W Cable.

We welcome you this morning. We have your statements, Ms. Foster, and Mr. Hewitt, which, without objection, will be made a part of the record in full. We hope you can summarize for us so that we can get right to questions, because we have read your testimony.

And I might say for the rest of the audience, we are going to break shortly before noontime and we will come back at 1 o'clock.

So why don't we begin with you, Mr. Hewitt? Welcome.

STATEMENT OF CHARLES C. HEWITT, PRESIDENT, SATELLITE BROADCASTING AND COMMUNICATIONS ASSOCIATION OF AMERICA

Mr. HEWITT. Mr. Chairman and members of the subcommittee, my name is Chuck Hewitt. I am the president of the Satellite Broadcasting and Communications Association. I am very happy to appear here before you in support of H.R. 1103. We represent the home dish industry, the satellite manufacturers, the distributors, dealers and programmers. The extension of the compulsory license, we believe, is vital to the further growth and competitiveness of our industry.

I can't help but note that in Mr. Hargrove's written testimony he makes the comment that millions of small dishes loom like a dagger over the hearts of networks and local broadcast distribution systems. We believe that is not only just a little harsh, we believe that it is wrong.

Starting in 1985 C-band manufacturers built into their electronic equipment an electronic switching device so that homeowners who had access to local channels could by remote control switch from a local broadcast to their satellite TV. They also have another port for cable, so today a home dish owner can have cable, a UHF–VHF antenna, and a satellite dish hooked up to the same receiver so he can switch back and forth between local and satellite-delivered programming.

And, in fact, inside cable franchise areas where home dishes exist, 27 percent subscribe to cable as well as to satellite subscription services. On a more important note, we believe that DBS is going to be a major friend of the local broadcaster, because DBS cannot provide local broadcast nor can it produce originated local broadcasting and so it will not compete with the local broadcaster and yet will need their consumers to have access to the local broadcast capability. So we are very excited about what the future holds for satellite and how it is going to become a competitor in this growing marketplace.

I would like to also point out that in 1986 there were only 5 superstations, and today we have 22 retransmitted signals of over 16 different stations. We have in the C-band industry, that is, with the 8- or 10-foot dish, we have over a million subscribers, of which 96 percent subscribe to a superstation or a network signal—to one or more superstations or network signals. Obviously, it is a staple in our programming services, and especially to rural America.

We can't overemphasize the importance of network signals to rural America. There have been many estimates of the millions of homes that do not have access to the network signals, but we believe that we are providing a vital service to those homes that do

not have access by providing critical communications information and entertainment to those rural areas.

We also believe the carriers are being diligent in complying with the unserved household requirements. There have been differences and we have had several meetings over those differences, and we look forward to future meetings with the network services and their affiliates to try to work out those differences.

But we don't believe that anything is needed to be added to the law or that Congress should be directly involved. It needs to be worked out in the marketplace itself.

As you may know, the SBCA along with the carriers brought an action in Atlanta concerning section 111 of the Copyright Act, and we won in the eleventh circuit. We do not want you to believe that we would be satisfied with being under section 111. Obviously, we need the security of knowing that we are going to be in service past December 31, 1994, but there are critical provisions in H.R. 1103, especially as it pertains to networks, that we believe have to be contained in the law. And so therefore we are urging you to move forward and pass H.R. 1103.

To illustrate the urgency of this matter, even though it seems to be almost 2 years away before December 31, 1994, in essence for a carrier or for a business or for a consumer dish owner it is not that far off. It is actually 9½ months because starting in January 1994, not December but in January, the business will have to change and stop offering annual subscriptions, because obviously they will not know if they will be able to provide the service past and beyond December 31. So we are critically affected by the lack of the extension by as early as December 31, 1993, not 1994.

So therefore we urge you to move forward on this legislation and pass it, and we appreciate your support in doing so. Thank you.

Mr. HUGHES. Thank you very much, Mr. Hewitt.

[The prepared statement of Mr. Hewitt follows:]

PREPARED STATEMENT OF CHARLES C. HEWITT, PRESIDENT, SATELLITE BROADCASTING AND COMMUNICATIONS ASSOCIATION OF AMERICA

Mr. Chairman and members of the Subcommittee, I am Charles C. Hewitt, President of the Satellite Broadcasting and Communications Association. I am very pleased to appear before you today in support of H.R. 1103 because, as you know, it is a significant piece of legislation that has important ramifications on the satellite industry—namely, the extension of the copyright license which the satellite carriers employ today to deliver popular superstation and network programming to consumers with home satellite receiving systems. I would like to extend to you our appreciation for your head start in making sure that the satellite copyright license is extended beyond its current expiration date of December 31, 1994. We will assist you in whatever way we can to usher H.R. 1103 through the legislative process in an as expeditious a manner as possible.

Mr. Chairman, the satellite copyright license which was established as Sec. 119 by the 1988 Satellite Home Viewers Act—the section which H.R. 1103 would extend—has been an unqualified success. In fact, we believe that it has gone well beyond its originally intended design of simply providing copyright licensing for the carriers, by also serving as an important competitive tool for the satellite industry. I will elaborate on this point shortly, but suffice it to say at this juncture that the enactment of the 1988 Act has been a milestone in the development of the satellite industry as an important and viable competitor in the delivery of video programming in the local market place. As we shall see, the matter of the availability of copyright licensing to the carriers is inextricably woven into the ability of the satellite industry to offer the types of program packages which attract consumers to acquire home satellite receiving systems in the first place.

The Sec. 119 license created by the 1988 Act has proven to be of enormous benefit to satellite consumers. Prior to passage of the Act, the satellite market was considered secondary or peripheral by the major carriers whose primary market was cable. The Act clarified the copyright liability of the carriers in serving home satellite consumers and helped "jump start" newer services aimed directly at satellite households. Today six satellite carriers provide 22 retransmitted broadcast signals (16 different stations—some offered by more than one carrier) to satellite homes, several of which are being uplinked with the satellite market as their primary audience. So in the first instance, the Act has encouraged the creation of a broader menu of available superstation programming thereby fulfilling viewers' demands for further diversity and choice.

In addition, the actual number of satellite systems and households subscribing to superstation programming has grown significantly. But first, a little history. We benchmark the inception of the satellite industry in 1976 when our Association's current chairman, Taylor Howard—a professor emeritus at Stanford University and cofounder of Chaparral Communications—built his own satellite receiving system in order to watch television at his home in the foothills of the Sierra Nevada mountains. By 1980, limited quantities of systems were available to the general public, and approximately 5,000 systems were delivered, albeit at the price of about $10,000 to 20,000 each.

Earlier this year, we celebrated the 4 millionth system shipped from the factory, at an average price of about $2,500 to $3,000 per system, together with the one millionth subscribing household. Much of this growth has taken place since passage of the 1988 Act, and with the transition to a new signal security system in 1992—the VCII Plus (Renewable Security) manufactured by General Instrument—we have seen some startling increases in superstation subscribers this last year alone. Of total subscribing households, 96% subscribe to one or more superstation or network signal. In fact, today there are almost 6 million individual superstation subscriptions, compared to 2 million just 2 years ago. As we approach the advent of the new, higher powered Direct Broadcast System satellite services in 1994, we are anticipating a further surge in direct-to-the-home satellite subscribers of all types.

A particular group of satellite subscribers for whom the copyright license has been vital are those who are located in rural areas where no over-the-air television or cable service is available. To them, satellite is their "window on the world," bringing them the news, sports, and entertainment which they would not be able to acquire by any other means. In addition to superstation programming, the fact that network programming is accessible to them is a very important feature of the Sec. 119 license, and that these households are willing to pay annual subscription fees to watch network programming indicates the need they have to view it. Furthermore, we estimate that there remains a large number of rural households which do not enjoy off-air television service of any kind. They, too, stand to benefit from the license by receiving superstation signals at such time as they choose to become satellite system owners and subscribers.

Congress recognized the need of rural viewers when it conceived the "unserved household" concept in the Sec. 119 license as it deals with the satellite delivery of network signals. It should be noted however that "unserved household" is not necessarily a *geographical* restriction, even though it is termed a "white area" in industry jargon. An "unserved household" is simply a residence which, for the purposes of the Act, is defined as a household that "cannot receive, through the use of a conventional outdoor rooftop receiving antenna, an over-the-air signal of grade B intensity (as defined by the Federal Communications Commission) of a primary network station affiliated with that network...." (Sec. 119[d][10][A]).

With regard to the delivery of network signals to satellite consumers, the law permits network signal reception by satellite by any household that is "unserved." We believe the carriers are very diligent in their marketing of network signals under the Act. We view any contestations of the "white area" procedure as a commercial matter, and we have urged the networks to work their differences out with the carriers in a business setting which is a more appropriate forum for deciding on the matter.

When the SBCA testified on statutory licensing before this Subcommittee almost two years ago, we stated that in early 1992 we would undergo negotiations with the copyright claimants to determine the satellite royalty fees for the 1993-1994 license period. As you know, we were not able to agree on a new fee schedule during the negotiations, and resolution of the matter was submitted to compulsory arbitration as called for in the Act. As a consequence, the carriers have been paying the new fees as determined by the panel since May, 1992. They are higher than the fees that cable operators pay for comparable superstation programming. However, it is clear

that in spite of the arbitrated fee levels which we would argue should have been lower, the process worked quickly and reasonably efficiently.

As a sidenote, H.R. 1103 calls for another rate negotiation with the copyright claimants with an arbitration panel to be initiated, if necessary, before June 1, 1995. That would be about three years after the recent rate adjustment. We would request that the rate adjustments instead be scheduled in five-year increments, simply to be put in an equivalent—but not necessarily identical—time frame with the other, copyright-paying multichannel video technologies. We would also suggest an appropriate lead time before a new rate goes into effect in order to allow the carriers to make the necessary contractual adjustments which would accompany a rate change.

Last year, the Congress passed into law the Cable Television Consumer Protection and Competition Act in order to stimulate local video competition among differing delivery technologies. It is evident from the facts at hand that the Sec. 119 copyright license created by the 1988 Act is, in itself, a valuable competitive tool. While initially established by the Congress in order to grant the satellite carriers a copyright license following the 1987 court decision in *Pacific & Southern* v. *SBN*, that license has provided a large number of consumer households access to popular news, entertainment, information and sports programming through either superstation or network signals.

Much of the same, or similar, retransmitted broadcast programming is delivered by cable systems to their subscribers by virtue of the permanent compulsory license contained in Sec. 111 of the Copyright Act, and of which cable has had the benefit since 1976. Because both the Congress and the Federal Communications Commission are deliberately pursuing policies of local video competition and diversity of choice, the satellite copyright license should be extended as a matter of sheer equity in order to afford our industry parity in the delivery of broadcast signals to the viewing public.

We participated last year in the copyright license reform discussions which you promulgated among the various parties interested in copyright licensing. In view of the evolution of the video market place, the rapid technological changes taking place in delivery technologies, and blurring of the traditional lines between copyright claimants and program distributors, a new approach to copyright licensing could be timely and useful. Under any circumstances, however, emerging technologies such as satellite must be given a chance to establish themselves in the market place in competition with older, more mature delivery systems. The satellite license plays an important function in that equation.

Mr. Chairman, H.R. 1103 is timely and is needed now. If there is one characteristic of a market place which is important to a business entity, it is *certainty*. The satellite carriers, like all businesses, must make business agreements, sign contracts, and make out-year business plans and projections—that is how they pursue their livelihood. At present, however, they do not know whether or not two years from now the Sec. 119 license will continue to exist. But in the meantime, they must continue to seek out new customers on the assumption that their license will be renewed in the very near future.

By the same token, over a million subscribing households also rely on the license to receive retransmitted broadcast programming and are at risk of being disenfranchised if the satellite license is not extended. We deeply appreciate your awareness of these conditions and your willingness to move forward with legislation. We will do everything possible to assist you in enacting H.R. 1103. It is a vital instrument in the satellite market place, and we would hope that enactment can be swift so as to prevent any disruption to the orderly delivery of broadcast programming to consumers throughout the country. Thank you for this opportunity to present the views of the satellite industry on this important matter.

Satellite Broadcasting and Communications Association

SATELLITE TV Facts-At-A-Glance

- ❒ **Over 4 million HSD systems shipped.**
- ❒ **Over 75 unscrambled services available to dish owners.**
- ❒ **Approximately 75 audio program services available.**
- ❒ **88 subscription services available.**

Satellite TV delivers a greater variety of programming than any other home entertainment medium. Plus, the Satellite TV consumer gets the best possible audio and video at reasonable rates! Take a look at what is available now on Satellite TV.

- ☆ Action (PPV)
- ☆ All News Channel
- ☆ American Movie Classics
- ☆ Arts & Entertainment Network
- ☆ BRAVO
- ☆ Cable Video Store (PPV)
- ☆ The Family Channel
- ☆ Cinemax (2 multiplex feeds)
- ☆ CMT (Country Music Television)
- ☆ CNBC
- ☆ CNN
- ☆ CTV: Comedy Central
- ☆ Discovery Channel
- ☆ The Disney Channel
- ☆ Eastern Microwave
  - — WSBK Boston (Ind)
  - — WWOR Secaucus, NJ (Ind)
- ☆ ENCORE
- ☆ ESPN
- ☆ FLIX
- ☆ Home Box Office (3 multiplex feeds)
- ☆ Headline News
- ☆ Lifetime
- ☆ Midwest Sports Channel
- ☆ MTV
- ☆ Nashville Network
- ☆ Netlink
  - — KUSA Denver (ABC)
  - — KCNC Denver (NBC)
  - — KMGH Denver (CBS)
  - — KRMA Denver (PBS)
  - — KWGN Denver (Ind)
- ☆ Nickelodeon
- ☆ Playboy At Night

225 Reinekers Lane, Suite 600 • Alexandria, Virginia 22314 • Phone: (703)549-6990 • Fax: (703)549-7640

- ☆ PrimeStar (Ku-Band)
  - — WTBS
  - — WGN
  - — WWOR
  - — KTLA
  - — WSBK
  - — KTVU
  - — WPIX
  - — Request TV (PPV)
  - — Viewers Choice 1 (PPV)
  - — Viewers Choice 2 (PPV)
  - — Japan TV
- ☆ PrimeTime 24
  - — WABC New York (ABC)
  - — WRAL Raleigh (CBS)
  - — WXIA Atlanta (NBC)
- ☆ Satellite Sports Networks
  - — Empire Sports Network
  - — PSN-Upper Midwest
  - — Sunshine Network
  - — Home Sports Entertainment
  - — KBL Sports
  - — Prime Ticket
  - — Pacific Sports Network
  - — P.A.S.S.
  - — PSN - Rocky Mountain
  - — PSN - Intermountain West
  - — Prime Sports Northwest
  - — PSN - Midwest
  - — Home Team Sports
  - — Prime Network
  - — Madison Square Garden Network
  - — Sports South Network
- ☆ Showtime (2 multiplex feeds)
- ☆ Spice (PPV)
- ☆ Superstar Connection
  - — WGN Chicago (Ind)
  - — WPIX New York (Ind)
  - — KTLA Los Angeles (Ind)
  - — KTVT Dallas/Fort Worth (Ind)
- ☆ The International Channel
- ☆ The Movie Channel
- ☆ Turner Network Television (TNT)
- ☆ TVN (10 channel PPV)
- ☆ USA Network
- ☆ The Weather Channel
- ☆ TBS Superstation
- ☆ VH-1
- ☆ Viewers Choice 1 (PPV)
- ☆ Viewers Choice 2 (PPV)

SBCA Office . . . . . **(703) 549-6990**
SBCA Facsimile . . . . . **(703) 549-7640**

SBCA Satellite System
SHIPMENT STATISTICS

ANNUAL SHIPMENT FIGURES

Year	Shipments	Total Installed Base
1980	5,000	5,000
1981	33,500	38,500
1982	130,000	168,500
1983	290,000	458,500
1984	515,000	973,500
1985	735,000	1,708,500
1986	227,500	1,936,000
1987	268,500	2,204,500
1988	346,000	2,550,500
1989	352,000	2,902,500
1990	383,000	3,285,500
1991	340,500	3,626,000
1992	364,000	3,990,000

MONTHLY SHIPMENT FIGURES

	1988	1989	1990	1991	1992	1993
January	25,000	28,000	29,000	26,000	24,000	25,000
February	18,000	19,000	29,000	24,000	23,000	
March	28,000	22,000	30,000	29,000	22,000	
April	26,000	22,000	29,000	30,000	28,000	
May	25,000	20,000	30,000	23,000	28,000	
June	24,000	24,000	26,000	28,000	28,000	
July	28,000	28,000	26,000	28,000	32,000	
August	36,000	36,000	36,000	28,000	36,000	
September	41,000	38,000	38,000	35,500	37,000	
October	39,000	45,000	37,000	35,000	39,000	
November	32,000	38,000	36,000	28,000	35,000	
December	24,000	32,000	37,000	26,000	32,000	

1992 vs. 1991: +23,500 systems

Units shipped as of Feb. 1, 1993: 25,000

Total Units Shipped as of Feb. 1, 1993: 4,015,000

Estimated Number of Satellite Systems
May 1, 1992

Alabama	92,500
Alaska	6,300
Arizona	58,600
Arkansas	64,400
California	367,000
Colorado	52,500
Connecticut	11,200
Delaware	7,500
District of Columbia	1,000
Florida	201,400
Georgia	99,800
Hawaii	1,600
Idaho	32,100
Illinois	103,700
Indiana	96,200
Iowa	59,500
Kansas	53,700
Kentucky	75,200
Louisiana	72,300
Maine	23,000
Maryland	37,300
Massachusetts	14,300
Michigan	142,500
Minnesota	56,000
Mississippi	64,000
Missouri	108,300
Montana	42,900
Nebraska	44,600
Nevada	32,100
New Jersey	22,000
New Hampshire	15,500
New Mexico	25,800
New York	123,000
North Dakota	15,500
North Carolina	188,800
Ohio	131,700
Oklahoma	63,500
Oregon	79,700
Pennsylvania	103,500
Rhode Island	4,100
South Carolina	69,500
South Dakota	17,000
Tennessee	144,200
Texas	320,400
US Territories	12,300
Utah	24,900
Vermont	21,000
Virginia	87,600
Washington	78,400
West Virginia	33,000
Wisconsin	70,100
Wyoming	18,100

Mr. HUGHES. Ms. Foster, welcome.

STATEMENT OF JANET L. FOSTER, CO-FOUNDER AND PRESIDENT, PRIMETIME 24, NEW YORK, NY

Ms. FOSTER. Thank you, Mr. Chairman, and members of the subcommittee. I think I am the first person today who has never testified before a subcommittee before, and I am only slightly terrified.

Mr. HUGHES. Well, we are delighted to have you.

Ms. FOSTER. Thank you very much. You do have my statement, and I don't want to spend a lot of time because I think there are questions, but I would just like to describe a little bit of the history of PrimeTime 24 and the people that we do service, and our experience under the Satellite Home Viewer Act. Obviously, we are here today in strong support of H.R. 1103. We feel it is very important, very needed, very necessary.

PrimeTime 24 is the satellite carrier that distributes ABC, NBC, and CBS programming to now, we are proud to say, over 450,000 satellite dish owners across the United States. These are people who live in the white areas, and that is an industry reference, kind of a term of art for unserved households, people who live beyond the reach of traditional broadcast signals, and those were people who in the past just didn't see television. That is where they lived, and they were used to it but not happy with it.

The kind of customers we serve are people like Ms. Opal Hoke of Arlsberg, WV, who is 77 years old, in the hospital right now—we hope she is going to be out real soon. She saw NBC for the first time in 1989 on a satellite dish that her son installed for her, and she is just a representative example of the kinds of people that we serve. Now, 450,000 customers, it means a lot to us and we are very proud of it. It may not sound like a very large number to some of you, because after all there are 92 million television households in the United States and there are about 55 million people who have cable TV. We are only serving 450,000 people.

But that is fine. We always knew from the beginning that there was a very limited number of people who are not served by over-the-air broadcasting. We created our business plan with that in mind, and I am happy to tell you now that almost 7 years after inception PrimeTime 24 is a going concern. We are happy to continue serving the white areas. We have made a business out of it, and we are proud that we are delivering programming to people who were never able to see it before.

We believe that the 1988 Satellite Home Viewer Act has been a success in several areas. It succeeded in clearing up a very murky legal landscape. It succeeded in making programming available to rural America, our constituency. It succeeded in imposing for the first time an arbitration approach to the setting of license fees for programming. You have already discussed that at some length this morning.

A major reason, the major reason why H.R. 1103 is so important to satellite carriers and our customers right now is the continuing threat of litigation that hangs over our ability to provide our service. We went into this in some detail in our testimony. It sounds like you are very familiar with it, so I won't recount it. But I will say that there has been barely a week in the history of PrimeTime

24 when we haven't been under the threat of litigation or dealing with litigation, often from multiple sources.

We are in that situation now today with the recent ruling of the eleventh circuit court. We don't know whether there is going to be an appeal of that or not. If there is not, and we certainly hope that there is not, and we think that that was the appropriate course of action, that unfortunately is just one circuit in the whole country. We are looking at a license that is near its end, and as Chuck described, it makes it very difficult to operate from a business point of view when you are in the annual subscription business and you don't know whether you can sell a subscription a year from now.

I would just like to take a moment to talk about our service to the white areas since that issue has come up as well. We now have 6 years of experience selling and qualifying to white area customers. The Satellite Home Viewer Act of 1988 restricts the sale of network superstations to unserved households—and I have to read this because I never can get it straight from memory. It is primarily defined as households that cannot receive through the use of a conventional outdoor rooftop receiving antenna an over-the-air signal of grade B intensity, and grade B intensity is essentially an engineering description of a clear picture. This definition was put in by the Congress to assuage the fears of some network affiliates that PrimeTime 24 was planning to deliver signal into broadcast delivery areas.

We have worked with the three networks to develop a qualification and notification procedure for all of our customers, and I would just like to take a moment to talk about some of the detail of that. Potential PrimeTime 24 customers must attest that they do not receive each of the networks clearly and that they have not had cable TV installed in the last 90 days. We report the addresses of all new customers back to the networks, allowing their affiliates to review them and challenge any which they feel are within the reach of their local quality broadcast signal. We then follow up by mail with those challenged customers requiring them to sign a declaration regarding signal quality.

Now, this is a tedious process. It is an expensive process. We would love to not to have to do these things. But we understand the concerns that a few network affiliates have in this area. Our only goal is to serve the unserved households. That was the purpose of the creation of our business. That is what we do today.

We will continue to work as we have in the past with representatives of the three networks and their affiliates to create a procedure that is fair to them and to our customers. And, although we have only seen Mr. Hargrove's testimony briefly this morning, I would like to comment that we were last given comments from the three networks on the workings of the white area procedure that we had developed in June 1991. We met with representatives of the three networks in August 1991 and subsequently adopted a number of their suggestions. In fact, most of their suggestions, if I recall correctly.

We reported to them that we had adopted these suggestions into our current procedures, and we have not spoken with them since. So we stand ready to meet with them as we have in the past, if they have new suggestions or additional comments for us.

In conclusion, we feel that H.R. 1103 is extremely important. We strongly support it and will work for its passage. It is very important for the well-being of our industry and for the thousands of customers that we do serve. And I would just like to end by saying that it is very easy to take the availability of ABC, NBC, and CBS for granted if you live in a major metropolitan area such as New York City. But Ms. Opal Hoke did not take it for granted. She is very happy that we are here providing our service, and we would like to continue to serve her and the thousands of people like her.

Thank you very much.

Mr. HUGHES. Thank you, Ms. Foster.

[The prepared statement of Ms. Foster follows:]

PREPARED STATEMENT OF JANET L. FOSTER, CO-FOUNDER AND PRESIDENT, PRIMETIME 24

Mr. Chairman and members of the Subcommittee, I an Janet Foster Co-Founder and President of PrimeTime 24, a satellite carrier that distributes ABC, NBC, and CBS programming to more than 450,000 home satellite dish owners throughout the United States.

As you know, the satellite industry and its customers have benefited from a license established by the Satellite Home Viewer Act of 1988—a license that is scheduled to expire at the end of 1994. We are here today to testify in strong support of H.R. 1103. We applaud the efforts of this subcommittee to ensure that delivery of superstation signals to home satellite dish owners continues beyond the end of next year, without the legal turmoil that surrounded satellite delivery of broadcast television programming in the late 1980's.

At PrimeTime 24 we are proud to say that we currently supply ABC, NBC and CBS affiliate signals to over 450,000 private households in every state of the Union. In the past, these homes were written off as "white areas"—unserved markets beyond the reach of broadcast signals or any other communications technology, never receiving the network programming that everyone else takes for granted. These formerly unserved homes are now back in the communications mainstream, watching the same broadcast news, entertainment and sports as the rest of America.

In the early days of our company, we were encouraged through the dark days of litigation by customers such as Mrs. Opal Hoke of Arlsberg, West Virginia. Mrs. Hoke saw NBC for the first time in 1989, on a satellite dish installed by her son. Today, there are 450,000 PrimeTime 24 viewers such as Opal Hoke, and we are proud to provide their link to the most important source of news, sports and entertainment in the United States today.

Now, 450,000 customers may not sound like much. After all, there are 92 billion total TV households in the United States, and 55 million households with cable TV. We can not even claim to serve a majority of the home satellite dish owners in the United States. But that's fine.

PrimeTime 24 always believed that the number of people who were not reached by conventional broadcasting was small. But we also believed that, with prudent management, we could provide critical service to this small market, making a profit and delivering ABC, NBC and CBS programming to people who had never received them before. I am pleased to report that, seven years after inception, PrimeTime 24 is a going concern looking forward to a future of serving our customers—with the assistance of H.R. 1103.

We believe that the 1988 Satellite Home Viewer Act has been a success. It succeeded in clearing up a very murky legal landscape, which I will discuss in more detail in a moment. It succeeded in imposing programming available to rural America, programming which the rest of America took for granted. It succeeded in imposing, for the first time, an arbitration approach to the setting of license fees for programming.

PrimeTime 24 participated in the arbitration process last year, along with the other satellite carriers. We found the process to be rigorous, to say the least. And probably none of the participants were completely happy with the final conclusions of the arbitrators. Our fees doubled, which had a major impact on our operation. And I'm certain that rights owners felt that they didn't receive enough. But we all had an equal chance to present our points of view, the arbitrators arrived at a decision, and we wereall able to move forward. It wasn't perfect, but it worked.

A major reason why H.R. 1103 is right on target is that the marketplace is again marked by litigation concerning the right of satellite carriers, such as PrimeTime 24, to operate after 1994. It is impossible to plan effectively or invest prudently in an atmosphere charged with the uncertainty of litigation, especially when the litigation goes straight to the heart of our right to serve. As the sadder but wiser veterans of several rounds of litigation, we are only too aware of their impact on the development of our business.

Satellite Broadcast Networks, a member company of PrimeTime 24, began operations in 1986 and was sued soon thereafter, even though we were paying copyright fees under the under the Cable Compulsory license. The suits were brought by each of the three networks and virtually all of their affiliates in 1987. That litigation was not resolved until well after the passage of the 1988 Satellite Home Viewer Act. On September 4, 1991, the U.S. Court of Appeals for the Eleventh Circuit decided that Congress indeed intended for SBN's satellite retransmissions to come under the Cable Compulsory license.

But that was not the end of it. Shortly thereafter, the Copyright Office published its final rule on the subject, finding that satellite carriers are *not* eligible to operate under the Cable Compulsory license after 1994—a finding which was, of course, completely contradictory to the decision of the U.S. Court of Appeals.

The satellite carriers as a group were forced to go to court. This past January, the U.S. District Court in Atlanta held that the 1991 decision of the Court of Appeals is controlling. Therefore, after 1994, satellite carriers will be entitled to operate under the terms of the Cable Compulsory License in Section 111 of the Copyright Act.

That latest court decision is sure to be the subject of dispute for some time to come, even though we firmly believe that it is correct and will ultimately withstand any further attack. The problem with continuing the fight—a seemingly endless fight, from our perspective—is that we cannot be assured that final clarification of our right to operate will come prior to the end of next year.

The well-timed introduction of H.R. 1103 brings us full circle. Once again, action by this committee is necessary to remove all doubt about the legality of distributing broadcast programming to home satellite dish owners in unserved areas of the United States—and to protect the right of rural citizens to enjoy the same television programming that most Americans take for granted.

I'd also like to comment on our six years of experience in serving the unserved households of this country, known within our industry as "white areas." The 1988 Satellite Home Viewer Act of 1988 restricts the of network signals to unserved households, primarily defined as households that "cannot receive, through the use of a conventional outdoor rooftop receiving antenna, and over-the-air signal of Grade B intensity"—an engineering description for "clear picture."[1] This definition was put in by Congress to allay the concerns of some network affiliate stations that PrimeTime 24 would deliver signals into their broadcast delivery areas.

We have worked with the three networks to develop a qualification and notification procedure for all of our customers. Potential PrimeTime 24 customers must attest that they do not receive each of the networks clearly, and that they have not had cable installed in the last ninety days. We report the addresses of all new customers back to the networks, allowing their affiliates to review them and challenge any which they feel are within reach of a quality signal. We then follow up by mail with those challenged customers, requiring them to sign a declaration regarding signal quality. Non-responsive customers are disconnected.

As you can imagine, we would prefer not to have to do these things because this is a very cumbersome and expensive procedure to manage. However, we understand the concerns that a few network affiliates have in regard to satellite delivery of network signals. Our only goal is to serve the unserved households, and we will continue to work, as we have in the past, with representatives of the three networks and their affiliates to create a procedure that is fair both to them and to our customers.

Those of us who started the company always believed that our service was only of value to people who could not otherwise receive the three major networks. People would not pay for a service which they normally received for free.

---

[1] The Grade B contour map of a particular TV station is only a predicator of a Grade B intensity signal. It is frequently wrong. The use of Grade B contour maps was specifically rejected for use in the 1988 Satellite Home Viewer Act because of their unpredictability. Nonetheless, we have received many challenges from network affiliates of customers which appear to be based simply on subscriber residence within the Grade B contour map of a particular station. When we follow up on such challenges, we nearly always find them to be unjustified.

In conclusion, we are encouraged by your efforts to ensure continued and uninterrupted delivery of broadcast programming to home satellite dish viewers. PrimeTime 24 supports this legislation and will work hard to have it passed. Given the recent rejuvenation of copyright litigation, we consider the swift passage of H.R. 1103 imperative for the well-being of our industry and the hundreds of thousands of consumers we serve. It's easy to take the availability of ABC, NBC and CBS for granted if you live in New York City. Thank you for your efforts to ensure that our rural customers' TV screens do not go dark at the end of next year.

I would be happy to answer any questions you may have about our business and our experiences in the marketplace. Thank you for the opportunity to address you today.

Mr. HUGHES. The gentleman from Rhode Island.

Mr. REED. I have no questions.

Mr. HUGHES. The gentleman from California.

Mr. EDWARDS. What do you pay to the networks for using their signals?

Ms. FOSTER. We pay a compulsory license under the Satellite Home Viewer Act, which was arbitrated last year. We now pay 6 cents per subscriber per month. That is a doubling of the fee that was initially set.

Mr. EDWARDS. Are the providers, the big networks, satisfied with that?

Ms. FOSTER. I guess you would need to ask them. I understand they are here later.

Mr. EDWARDS. All right.

Ms. FOSTER. We think we are paying too much, and I would imagine that they probably think we are paying too little.

Mr. HUGHES. Well, that sounds like the makings of a pretty good compromise.

Ms. Foster, I note that you were somewhat critical in your statement of the rate. Disappointed, let's put it that way. It was a little higher than you anticipated. However, you did not appeal that decision once it was affirmed by the Copyright Royalty Tribunal. Does that suggest to me that you were fairly satisfied?

Ms. FOSTER. As I just mentioned, our rate doubled, which was certainly more than we had anticipated, and we are currently paying significantly more than a cable operator is for the exact same sort of service.

Mr. HUGHES. Well, you obviously must have felt you couldn't do very much better or else you would have appealed.

Ms. FOSTER. I tell you the arbitration process, it was real interesting. None of us, obviously, had been through it before. It was very rigorous. It was intense. A lot of work went into it. A lot of time went into it.

I wouldn't characterize it as a perfect way to go, but I can't come up with anything better, and we agreed going into it that we would live with the results, and we have.

Mr. HUGHES. So overall it worked fairly well, although it was intense and although you were somewhat disappointed, I suspect that the broadcasters were disappointed too.

Ms. FOSTER. I am sure they were. We appreciated the fact that we had the opportunity to present our point of view and backup for our point of view and to make our case, and you really can't ask for much more than that.

Mr. HUGHES. That seems to me to suggest, as Mr. Oman, I think, did in responding to a question he received, that perhaps the next

time around maybe the parties can work it out amicably because it is a gamble as to whether you are going to come out better than you anticipate and all sides basically believe that they can do better. But frankly, it is a roll of the dice as to how you are going to come out. That would suggest to me that it worked fairly well.

Mr. HEWITT. I think you have to look at it sort of as an ongoing marriage that maybe one of the parties didn't like being in and you have to go through a divorce every 5 years, but when you get through it neither side is satisfied, which means it worked as well as you might expect.

Mr. HUGHES. Sort of a shotgun marriage.

Mr. HEWITT. Yes.

[Laughter.]

Mr. HUGHES. Arrangement.

Mr. HEWITT. Yes.

Mr. HUGHES. I understand. As you read Mr. Hargrove's written statement, he raises an issue that you have touched on—I know that both of you are aware of this because you just commented on it—verifying the customers wishing to receive network signals in so-called white areas. He supports extension of section 119, as you know from his statement, but he does want to do something to clear up what his members see as a deficiency in the current statute, enforcement of a white area restriction. That appears to be a rather constructive approach.

What are your comments on it? Ms. Foster. Or Mr. Hewitt.

Ms. FOSTER. Again, it is hard for me to get into specifics since we only saw the details of his comments about an hour ago. But we will certainly go through them and we would be happy to follow up with you with a written statement as to where things stand today.

But we stand ready to meet with them at anytime to discuss their concerns, and we appreciate that they are real and we don't think that they are being unreasonable. Well, sometimes we do. But we understand that there are significant concerns on the parts of some of his affiliates about these issues.

I guess I would just comment that if we truly were creating as many problems as are described in the document I would, hopefully, have an awful lot more customers than I have today.

Mr. HEWITT. I think you will see that the satellite industry really wants to see the networks and the local broadcasters as our friends, and we think that they are. And I think that, you know, we recognize that there is some dissatisfaction about the white area situation and we need to do what we can to work with the networks to straighten that out.

But there is not an easy solution because unless you are able to go out in the field and check everyone—we know of cases where a homeowner can actually see the transmitter of the broadcast station, but it is ghosted so badly because of the echoing back and forth in the mountainous area where they live that they really don't get the signal, and so it is very hard because sometimes the broadcaster has the tendency to just want to say everything inside the grade B contour is automatically served when it is not necessarily true.

So it really is a difficult situation and I think that as an industry we want to see the parties sit down and work it out so we both are satisfied.

Mr. HUGHES. Well, that is a good constructive approach. Frankly, you wouldn't want to see us try to take it on because, as Mr. Moorhead said today, we have the capacity to mess these things up. We did last year.

Ms. FOSTER. Well, I wouldn't agree with it.

Mr. HEWITT. We would like to see the marketplace work it out, and we would like to sit down with the networks and do it.

Mr. HUGHES. That is what we should do, and I would urge you to do that, continue to work with them.

OK. I have no further questions. Thank you very much. You have been very helpful to us today and we appreciate it.

Mr. HEWITT. Thank you.

Ms. FOSTER. Thank you.

Mr. HUGHES. I want to take the testimony from our next panel, and we are going to break in about, hopefully, 15 minutes. Our next panel consists of Mr. Preston Padden and Mr. Wade H. Hargrove.

Mr. Padden is senior vice president of Fox Broadcasting Co. He is no stranger to the committee. He has been before us a number of times. In fact, he testified last year on H.R. 4511 and provided some valuable insights and help in drafting that particular piece of legislation.

Mr. Hargrove appears on behalf of the Network Affiliated Stations Alliance. He is a partner in the Raleigh, NC, law firm of Tharrington, Smith & Hargrove, where he specializes in media and public utilities law.

We welcome both of you. We have your testimony, which, as you know, we have read. We would like you to summarize because we are going to put your full statements in the record, without objection. You may proceed as you see fit.

Mr. Padden, welcome once again.

STATEMENT OF PRESTON R. PADDEN, SENIOR VICE PRESIDENT, AFFILIATES, FOX BROADCASTING CO.

Mr. PADDEN. Thank you, Mr. Chairman. I am appearing only on behalf of my own company today, but I was asked on behalf of the Motion Picture Association to state that their nonappearance here today is a result of the association's view that they need to wait and see what is going to happen at the FCC and in the courts with respect to retransmission consent before they can reasonably come to a conclusion regarding their position on these matters here today.

Mr. HUGHES. In other words, the hounds are not barking because they are waiting to see whether they are going to get fed tonight. Is that what you are saying?

Mr. PADDEN. I have passed along the message I was asked to deliver.

Mr. HUGHES. We thank you. We suspected it was something like that.

Mr. PADDEN. Our company is one of those normally noisy dogs that won't disappoint today, I suspect. And, at the risk of raining

on the parade of this bill, we would urge you as fervently as we could to try to find an orderly way out of compulsory licensing rather than digging yourselves in deeper.

We agree with the statement in the House report on the adoption of section 119 that the Government ought to resort to compulsory licensing only when the free marketplace cannot suffice, and we think there is abundant evidence in the marketplace that negotiated copyrights can be worked out for all of this programming without the need for the Government to wade in and try to figure out the conflicting claims of all the parties. We would point out that every day of the week, 24 hours a day, dozens and dozens of cable networks transmit programming to cable headends around the country, all through negotiated copyright, without the need for any government intervention or compulsory licensing at all. It is simply a matter of the people who own the product sitting down and making an arrangement with the people who seek to distribute the product.

I would also point out that the new high-powered DBS system planned by a wonderful company, U.S. Satellite Broadcasting, announced just 2 weeks ago agreements to distribute multiple cable networks of programming all, again, without any need for government intervention. No compulsory license. It was all negotiated by the parties.

Our own company has a satellite service we call Foxnet that every day of the week feeds 24 hours a day of programming including all of the programming on our broadcast network to cable systems serving more than 2 million subscribers across the country, and the compulsory license is not involved one iota in any of that activity. It was, again, simply a matter whereby we bought the rights to the programming we wanted to distribute, and then we sat down and negotiated license agreements with the cable operators.

We are in the business of selling eyeballs, and it is not in the interest of Fox or any of the networks or any broadcasters to deny any consumers access to our programming. We want them to get it. I was listening to the comments Ms. Foster made about Opal Hoke in West Virginia. We all want her to see programming. That is not the issue. A satellite dish is a wonderful way to get it to her. The question is are the people distributing it to her going to have to negotiate with the people who own that programming or are they going to come before the Congress and seek licenses to use other people's products?

Ms. Foster commented about the heavy history of litigation her company has been involved in since their inception, and I think some of that had to do with the fact that they went into the business of selling things that didn't belong to them, and as a result they ended up with a lot of litigation.

We also think government intervention inevitably brings about unintended dislocations. We have lots of newer stations, as you know, Mr. Chairman, under the definition of local service area in section 111 who are denied the same opportunity to be carried on cable in their local markets simply because of this statutory definition. They would like to be carried. The cable operators would like to carry them. But because we are stuck with these definitions that

go back to the old 1972 "must carry" rules, there is nothing either party can do about it.

Also, under section 119 Fox affiliates do not enjoy white area protection that is enjoyed by the ABC, CBS, and NBC affiliates. Now, when section 119 was adopted Fox was only programming 2 nights a week. But as of this June, we will be out to a full 7 nights a week, and this is just one more indication of how difficult it is for any regimented legislative program to keep up with a marketplace as dynamic as the one we have today. I think you are absolutely right. You are going to see the telcos in here, and it is only going to get worse, unless the subcommittee finds an orderly way to get out of the business of compulsory licensing.

We are very sympathetic to the level playing field argument of the wireless cable people in particular. We would simply ask you that in any bill you move trying to level the playing field, that you make an integral part of it a phaseout of all compulsory licensing, and for so long as there is going to be a compulsory license try to deal with some of these dislocations like the definition of local service area and the fact that Fox affiliates do not enjoy the white area protection today.

Thank you.

Mr. HUGHES. Thank you, Mr. Padden.

[The prepared statement of Mr. Padden follows:]

PREPARED STATEMENT OF PRESTON R. PADDEN, SENIOR VICE PRESIDENT, AFFILIATES, FOX BROADCASTING CO.

Thank you Mr. Chairman. My name is Preston Padden and I am Senior Vice President of Fox Broadcasting Company and of Fox's parent company the News Corporation. We sincerely appreciate this opportunity to appear and offer our comments regarding statutory copyright licensing in today's television marketplace. At the outset, I want to reiterate our considerable admiration for the efforts of the members of this Subcommittee and its Chairman and staff to deal with these matters of extraordinary complexity and contentiousness.

This morning I'd like to offer four reasons why the government should be pursuing an orderly way out of the compulsory licensing quagmire rather than getting itself in deeper. First, at a time when our whole nation is focused on streamlining and "reinventing" government, it seems to us that the licensing and pricing of different kinds of television programs to different distribution media is not a function that is particularly well suited to government processes. We agree with the view expressed in the House Report on Section 119 that "Congress should impose a compulsory license only when the marketplace cannot suffice." HR. Rept. 100-887 at p. 15.

Second, today's marketplace is rampant with examples that copyrights in programs exhibited by cable and by satellite can be cleared through free market negotiations without any necessity for government intervention. Twenty-four hours a day, cable operators exhibit thousands of programs on dozens and dozens of cable networks—all copyright cleared through free market negotiations. Just two weeks ago, a new high power k band satellite service, USSB, signed free market copyright agreements to exhibit all of the programs on HBO, Showtime, Cinemax, The Movie Channel, Flicks, MTV, VH1 and Nickelodeon/Nick at Night. And, as we sit here today, Fox is licensing its 24 hour Fox Net cable service, which includes all of its broadcast network programs, to cable operators serving nearly 2 million subscribers nationwide—all without the benefit of compulsory licensing intervention by the government.

A third reason to move away from compulsory licensing is that government intervention inevitably creates unintended competitive dislocations in the marketplace. For example, the definition of "local service area" in Section 111 creates a completely unintended disparity in the cable carriage patterns of locally competitive television stations. Newer, mostly UHF stations are frequently considered distant signals in areas where their older, mostly VHF competitors are considered local. This distorted effect inhibits competition in the television marketplace .

Another potentially serious dislocation is evident under the satellite license in Section 119. The exclusive program rights of ABC, CBS and NBC affiliates are protected against infringement by statutorily licensed satellite telecasts. The same is not true for Fox affiliates and independent television stations.

The fourth and final reason to phase out compulsory licensing is that all of the complexities and dislocations of government intervention will only get worse as the video marketplace continues to evolve. For example, Southwestern Bell, a multi-billion dollar telephone company, recently purchased several cable systems in the Washington, DC metropolitan area. Plainly, a company like Southwestern Bell does not need the assistance of this Subcommittee in securing copyrights to exhibit television programs on its system. Other telephone carriers are proposing to build their own video distribution networks. The status of these networks with regard to compulsory licensing is far from clear. However, it is a safe bet, that this Subcommittee will get dragged into a host of contentious licensing questions unless it takes steps to disengage.

Fox urges the Subcommittee to focus on ways to phase out, rather than to extend, the cable and satellite compulsory licenses. In addition, for however long these licenses remain in effect, we would ask that they be amended to correct two of the most significant competitive distortions caused by the current statutory scheme. First, the definition of "local service area" should be revised along the lines of provisions in H.R. 4511 from the 102nd Congress. Specifically, we would urge that all stations be deemed to be local in accordance with the existing statutory test and additionally throughout their television market as defined by the FCC. Under this two part approach, no television station would lose its "local" status as to any cable system. And, all stations would be assured of being deemed "local" for copyright purposes throughout their own local television marketplace.

The second amendment we would request would be to establish equality among television stations affiliated with ABC, CBS, NBC and Fox with respect to the impact of the satellite license in Section 119. When Section 119 was adopted, the Fox network was programming only Saturday and Sunday nights. As of this coming June, Fox will have evolved to a full seven-night-a-week emerging television network. Its affiliates should be entitled to the same white area protection as affiliates of ABC, CBS and NBC.

For all of the foregoing reasons we urge the Subcommittee to fashion an orderly withdrawal from the business of statutorily licensing and pricing television programs. We are sympathetic to the goal of creating a level playing field between cable and other distribution technologies. However, an evenhanded phase out should be a part of any legislation extending the existing compulsory licenses. In addition, we respectfully request inclusion of the two amendments discussed above to ameliorate significant marketplace dislocations caused by the current statutory scheme.

Mr. HUGHES. Mr. Hargrove, welcome.

STATEMENT OF WADE H. HARGROVE, ESQ., THARRINGTON, SMITH & HARGROVE, ON BEHALF OF NETWORK AFFILIATED STATIONS ALLIANCE, RALEIGH, NC

Mr. HARGROVE. Thank you very much, Mr. Chairman. The Network Affiliated Stations Alliance (NASA), is a coalition of the ABC, CBS, and NBC affiliate associations, and its membership consists of over 650 local television stations that are located across the country and affiliated with one of the three major television broadcast networks.

With me are the chairman of NASA and members of NASA Government Relations Committee. They are here to underscore their concern for some of the issues that have been raised this morning. They have come from all across the country to be here.

The three broadcast networks and the three affiliate groups worked with the subcommittee back in 1988 to secure passage of the Home Satellite Viewer Act. We initiated a cooperative, joint effort to provide broadcast service for all Americans, and we believe it was in the public interest to have done so. We share the interest of Ms. Foster of PrimeTime 24 and other satellite program provid-

ers in making sure that all Americans, wherever located, have reasonable access to broadcast network programming.

In adopting the act, however, Congress was not unmindful of the necessity to protect the existing national network and local affiliate distribution system. Congress recognized in adopting the act that their distribution system has served the Nation well. The "white area" exception was formulated to preserve the existing network affiliate distribution system and the concept of localism which, of course, lies at the heart of the Nation's broadcast regulatory scheme.

As has been mentioned, enforcement of the white area exception has been difficult, frustrating, and expensive, and as Mr. Coble noted earlier in reading from my prepared testimony, coping over the past 4 years with the enforcement of the act has, in the main, been a colossal nuisance for local television stations. But the stakes get higher for the future as the number of dishes proliferate and as DBS comes on line.

The prospect next year of high-powered direct satellite-to-home broadcast service and the expected proliferation of millions of small satellite receivers looms like a dagger over the heart of the existing national network and local affiliate distribution system. I know that it is not the desire of this subcommittee or you, Mr. Chairman, to injure the network and affiliate system, and we solicit your assistance in making sure that the act is amended in the days ahead to address our concerns in this regard.

We have had a number of meetings with PrimeTime 24. They have been cooperative and cordial in trying to work with us. However, we do have a different point of view, and our core concerns have not been resolved.

I can attest from personal knowledge, having called the satellite carriers and requested satellite service, that the customer service representatives of these companies simply do not go through, as one would expect, the statutory qualifications for satellite service. I encourage members of the subcommittee to call the carriers as well.

There is another concern that has troubled us, which is the failure of the satellite companies to implement a meaningful audit process or conduct sample site measurements. The subcommittee, back in 1980, specifically contemplated that the carriers would audit their customer subscription lists.

In conclusion, we look forward to working with you, Mr. Chairman, and members of the subcommittee and the staff to formulate amendments in the days ahead. As we noted, our principal concerns are with the long-awaited arrival of DBS which is only now months away, and we believe that the act needs to be amended to correct the extensive deficiencies. This necessity creates a timely and, we believe, compelling imperative for all of us to work in concert to fashion a fair and balanced solution.

Thank you.

Mr. HUGHES. Well, thank you, Mr. Hargrove.

[The prepared statement of Mr. Hargrove follows:]

PREPARED STATEMENT OF WADE H. HARGROVE, ESQ., THARRINGTON, SMITH & HARGROVE, ON BEHALF OF NETWORK AFFILIATED STATIONS ALLIANCE, RALIEGH, NC

Thank you, Mr. Chairman.

I am Wade Hargrove, and I appear on behalf of the Network Affiliated stations Alliance ("NASA"), a coalition of the ABC, CBS and NBC Television Station Affiliate Associations. NASA's membership consists of over 650 local television stations throughout the nation that are affiliated with one of the three major television broadcast networks.

We appreciate this opportunity to present our views on H.R. 1103.

We support H.R. 1103's reauthorization of the Home Satellite viewer Act. The three broadcast networks and their affiliates worked with this Subcommittee in 1988 to remove existing statutory copyright impediments to enable those who reside beyond the reach of a local terrestrial network affiliate to receive network programming by satellite. We believed then, as we do now, that the public interest is served by assuring all Americans reasonable access to broadcast network programming.

As you know, the Act restricts the satellite delivery of broadcast network programming to dish owners who reside in "white areas," i.e., areas which, by reason of distance, electronic interference, terrain or other obstructions do not receive an acceptable off-the-air signal from a network's local affiliate. In adopting the Act, Congress recognized that the indiscriminate duplication by satellite of a local affiliate's network programming would eventually undermine the existing national network/local affiliate distribution system—a system which Congress acknowledged has "served the country well."[1] The network/affiliate distribution system combines the market efficiencies of national program production and distribution while reposing in local affiliates the ultimate decision for final program selection. The efficiencies of this distribution system provide local affiliates with the economic foundation necessary to enable them to provide, in addition to a national network program service, local news, information and public service programming. The Act was designed, in short, to preserve the concept of "localism," which, of course, lies at the heart of the nation's overall broadcast regulatory scheme.

I regret to report that the Home Satellite viewer Act has not been as successful in achieving its intended objectives as many had hoped. The "white area" exception has proved to be extremely difficult and excruciatingly expensive for affiliates to administer. While we understand the natural inclination of satellite carriers to expand the reach of their customer base, their failure to cooperate fully with local affiliates in monitoring and assuring compliance with the Act's "white area" restrictions has been disappointing.

While coping over the last four years with the satellite delivery of broadcast network programming has, in the main, been a colossal nuisance, the stakes for the future get higher. The prospect next year of high-powered DBS service with the expected proliferation of millions of small satellite receivers looms like a dagger over the heart of the existing national network/local affiliate distribution system. For that reason, we will be recommending to the Subcommittee in the days ahead a number of constructive modifications to the existing Act. These modifications will simplify the monitoring effort and strengthen enforcement of the Act's "white area" provisions. We solicit cooperation from the satellite carriers in this effort.

Local affiliates have found it expensive, if not impossible, to achieve meaningful enforcement of the existing Act. Time and again, affiliates have discovered homes within a few miles and in plain view of their station's transmitting towers that are receiving satellite service from a duplicating network station located hundreds, in some cases thousands, of miles away. Affiliates have expended countless hours and incurred substantial legal fees trying to monitor and assure satellite carrier compliance. This has produced a sense of enormous frustration—bordering on despair—on the part of many affiliates.

While it would take far more time than we have this morning to review all of the compliance problems, Attachment A to this statement contains a sample of letters received from local stations—some recent, some from a couple years back—which are reflective of the difficulties. One of the memos is from Larry Chase, President and General Manager of station KIVI, an ABC affiliate in Nampa, Idaho. Mr. Chase explains that he visited his wife's cousin who resides within his station's metro viewing area. He discovered to his surprise that the cousin was receiving by satellite a distant Denver ABC station. Mr. Chase subsequently filed with the satellite carrier a challenge to the eligibility of that home to receive ABC service. He never received a response from the carrier and recently discovered—two years later—that the satellite carrier never terminated the Denver ABC service.

---

[1] H. Rept. No. 887 on H.R. 2848, 100th Cong., 2d Sess., Part 2 at 20 (1988).

The experience reported by Mr. Chase is typical. Affiliates complain that protests and challenges to illegal subscribers routinely seem to fall into a "black hole" in the corporate offices of the satellite carriers without response or remedial action.

Satellite carriers, on the other hand, point to the large volume of affiliate challenges as evidence of affiliate harassment and substantive invalidity. We disagree. The deficiencies, both in the content and form in which subscription data are furnished to the networks and their affiliates and in the inadequate pre-subscription screening process utilized by the carriers before authorizing service, have made it impossible for affiliates to fulfill in any meaningful way their statutory monitoring functions.

I can attest from personal knowledge to the inadequacies of one satellite carrier's pre-subscription screening process. On several occasions, I have called one of the carrier's "800" telephone numbers to see if the carrier would disqualify me for broadcast network satellite service. The customer service representatives have seemed to be familiar, but not readily conversant, with the service eligibility criteria. They tended to gloss over details which are essential to any determination of a subscriber's service eligibility. Equally disconcerting, I was advised that no reduction in price would be made if I failed to qualify for receipt of all three network signals—a fact which perhaps explains why many subscribers who, for example, might receive adequate local NBC and CBS service and only order satellite service to receive ABC programming, end up receiving satellite service from all three networks.

Over a year ago, we requested and conducted several meetings with representatives of one of the carriers, PrimeTime 24. It was our hope that a voluntary agreement could be reached with that company which might, in turn, serve as a model for the other carriers. Attachment B to this statement contains an analysis we submitted at that time to document the company's non-compliance with the Act and to propose specific solutions. It is not my desire, incidentally, to unfairly single out PrimeTime 24. Its representatives are most cordial and profess a genuine desire to comport with the Act. Some recent improvements on PrimeTime 24's part have been noted, but, regrettably, our core concerns remain unresolved.

Here are a few of them. We have asked the satellite carriers to furnish the "names" of their subscribers so local stations could more readily locate and verify their eligibility for service. One of the carriers has refused to do so.[2] Its refusal comes in the face of Reports, both from this Subcommittee and that of the House Commerce Committee, accompanying the Home Satellite viewer Act which expressly state that satellite carriers "must" furnish the "names" of their subscribers to the networks for the purpose of verifying eligibility.[3] Surely, it is not asking too much for the carriers to provide this information.

The address information furnished for rural subscribers makes it especially difficult for affiliates to locate and verify their service eligibility. The addresses of rural subscribers are frequently identified only by box and RFD number, e.g., "Box 120, RFD 3, Taylor, Illinois." You can easily imagine the difficulty a station encounters in trying to locate hundreds of rural dish owners with only this identifying information.

Even where the address data has been more descriptive, the verification process has proved difficult, if not impossible. The "home" or "billing" address of a subscriber, even if ascertainable, may have nothing to do with the actual location of the dish. This problem was underscored for a CBS affiliate in Scranton, Pennsylvania, when the affiliate protested to the satellite carrier that CBS network programming was being provided by satellite to a local sports bar. As I understand it, the carrier admitted that the service to this commercial establishment came from the carrier's company and that it was being provided unlawfully. The carrier claimed, however, that the customer could not be identified or located from the carrier's records. That response is perplexing. Since a satellite may be located or moved anywhere without regard to the billing address of the customer, the carriers should obtain from their subscribers and, in turn, furnish to affiliates information sufficient to locate and identify the owners and addresses of migratory dishes.

This Subcommittee was not unmindful in adopting the Act of the difficulty local stations would likely have in verifying whether subscribers could receive an accept-

---

[2] PrimeTime 24 professes concern for the privacy of its subscribers and for the proprietary nature of its subscriber list. Those issues could be easily addressed by a legislative requirement prohibiting affiliates from using subscriber information for any purpose other than for verification of service eligibility. The 1984 Cable Act provides constraints against the unlawful disclosure by cable companies of their subscribers, and that concept could easily be applied here.

[3] See H. Rept. No. 887 on H.R. 2848 , 100th Cong., 2d Sess., Part 1 at 18 of the House Committee On The Judiciary, and Part 2 at 20 of the House Committee On Commerce (1988).

able local network signal off-the-air. The Subcommittee, in its Report accompanying the Act, admonished satellite carriers to be "... diligent in avoiding and correcting violations through an internal compliance program that includes...[among other things] *sample site measurements* and *periodic audits,* all of which must be served upon each network...to monitor the distributor's compliance with the statute."[4] [Emphasis supplied.]

To the best of our knowledge, the satellite carriers have not conducted any site measurements. If they have, they have failed to share them with us. That failure is clearly at odds with what this Subcommittee contemplated in 1988.

In conclusion, local network affiliates look forward to working with the Subcommittee and with the satellite carriers to formulate amendments to assure that the original objectives of the Home Satellite Viewer Act are achieved. As noted earlier, with the long-awaited arrival of high-powered DBS service now only months away, reauthorization of the Act and the need to correct its deficiencies create a timely and compelling imperative for all of us to work in concert to fashion a fair and balanced legislative solution.

Thank you.

[4] H. Rept. No. 887 on H.R. 2848 , 100th Cong., 2d Sess., Part 1 at 19 (1988).

ATTACHMENT A.--LETTERS FROM LOCAL NETWORK AFFILIATES

KIVI
ABC TELEVISION
Sawtooth Communications, Inc
1866 East Chisholm Dr Nampa, Idaho 83687-6899
Nampa (208) 467-3301 Boise (208) 336-0500 FAX (208) 465-5417

February 17, 1993

To: Wade Hargrove

Fr: Larry J. Chase

Re: White Area Enforcement

Over the past couple of years it is safe to say I and my Chief Engineer have gone through thousands of Netlink and Prime 24 subscriber lists. Throughout this time period we have turned in hundreds of subscribers who are in our Grade A signal. Grade B and ADI have never concerned us at KIVI due to mountainous terrain.

I never realized how the current bill was being abused until I ran into a detailed example. During a family get together at my wife's cousin's house I noticed KUSA of Denver, Colorado, on their television set. I asked how they were picking up the signal and they explained to me how they were telephone solicited. The White Area issue had not been discussed and they were unaware of any copyright problems. Months passed and their address showed up on a list of subscribers. I circled it and two years later they still had KUSA from Denver even though they live in the middle of our metro viewing area. In my opinion this is what broadcasters have been facing since the Home Satellite Act was first enacted. I would hope for something with teeth in it as we look towards replacing the law in 1994.

KTVX
UTAH

DATE: 11 March, 1993

TO: Wade Hargrove

FROM: Jim McDermaid, Chief Engineer

SUBJECT: Satellite Home Viewer Act.

It has been my duty to examine the lists and challenge illegal subscribers under the Satellite Home Viewer act.

I noticed that whenever I caused a person to be canceled, they would show up on a disconnect sheet (sometimes) and immediately show up on the next new connect sheet.

I had a person located in West Valley Utah call the station several times (abusively) after I had succeeded in de-authorizing his Net-Link service. After I refused to allow the service I received a phone call from Senator Jake Garn's office telling me that "I needed to be absolutely sure this viewer could receive off air television before I prevented him from receiving Net Link". To cover myself I drove to the residence. While sitting parked in front of his house I could visually see our transmitting tower 15 miles to the west on the mountain top. I could view a perfect off air signal seated in the car with the antenna completely collapsed on my portable tv.

I don't think it is actually possible to permanently disconnect a subscriber.

I watched this years Superbowl at a house I had previously denied satellite service. We watched the Atlanta feed with TBN inserted commercials. The local NBC affiliate has a perfect air signal at this house.

KBCI 2

March 12, 1993

Mr. Wade Hargrove
c/o Tharrington, Smith, & Hargrove
P.O. Box 1151
209 Fayetteville Mall
Raleigh, North Carolina 27620

Dear Mr. Hargrove:

My colleague, Larry Chase, at KIVI TV in Nampa, Idaho suggested I write and detail my station's experience with the "Home Satellite Viewing Act".

Our experience has been: "What Home Satellite Viewing Act?".

We have been very diligent in our efforts to identify illegal non-white space satellite viewing. For months, we have examined the reams of data and have identified many of the privately owned satellite non-white space users.

We filed for disconnect as we were instructed to and most were disconnected only to be re-connected a couple of months later. Many, and I must say, the majority have been within our grade A signal; some as close as a half a mile from the station.

The amount of paperwork and effort we put into this is astounding.

The signal providers don't care about the law. They rehook them up as soon as they can after we file to have them unhooked.

It is very clear to us that the "Home Satellite Viewing Act" is not enforced or respected by the satellite providers. It's amounted to a joke.

Sincerely,

Tim Bevur
General Manager
KBCI TV-2

TB:jpp

NORTHWEST TELEVISION, INC.
P.O. Box 2, 1007 West Jefferson, Boise, Idaho 83707
(208) 336-5222 • FAX (208) 336-9183

WTVF
5
Nashville

June 13, 1991

Gregory M. Schmidt, Esq.
Covington & Burling
1201 Pennsylvania Avenue, NW
P. O. Box 7566
Suite 705-A
Washington, DC 20044

Dear Greg:

I am writing at the request of William Murdoch regarding the frustrations I have encountered in reporting violations by Netlink and SBN of the Satellite Home Viewer Act.

In the two years I have been keeping records, I have reported 1891 violations to the Act. Nearly two-thirds of these violations have come from SBN. Over that same period of time, only 410 of these homes were disconnected - nearly 1,500 violations still exist.

I have received to date no actual correspondence from Netlink other than what I receive in my monthly mailing from CBS. My last and only correspondence from SBN came in December of 1989 in which they responded to 32 violations. SBN concluded that all 32 homes were eligible because they did not receive an acceptable over-the-air CBS signal. This is a farce - one of the homes is in the same section of Nashville that I live in and I can definitely receive our signal.

In fact, over the past two years, I have reported 119 violations within the Nashville city limits (83 of them by SBN) that have yet to be disconnected. One of these is a bar/restaurant named Applebee's that is in my neighborhood. I even noted this fact on my report to SBN in January of 1990.

It's obvious that neither company is making the effort to check out the violations. I'm sure many of the disconnects to date have been because either the viewer decided to drop the service or he didn't pay his bill.

WTVF

If I can provide you with any more information, please contact me at (615) 248-5242.

Sincerely,

Mark Binda

Mark Binda
Program Director

cc: Thomas E. Ervin, President & General Manager, WTVF
William Murdoch, Vice President & General Manager, KSL-TV

Channel Five Television Company • 474 James Robertson Parkway • Nashville, Tennessee 37219 • (615) 244-5000
A Division of H&C Communications, Inc
A CBS AFFILIATE

KBCI 2

TELEVISION

July 2, 1991

Gregory M. Schmidt, Esq.
Covington & Burling
1201 Pennsylvania Ave., N.W., #705A
P.O. Box 7566
Washington, D.C. 20044

Re: Satellite Carriers

Dear Mr. Schmidt:

Of the 198 reported apparent violations of the Home Viewer Act of 1988 to NETLINK, response to only one has been made.

Of the 44 cases reported to SBN, no responses have been received. In one of the Boise, Idaho, instances this station visited the home, measured the signal strength and observed the picture adjacent to the house and found no problems. The results were reported to SBN-2, but no reply was received. The address in question has not appeared on any deletion lists.

It has been noted that of questioned feeds, 55 disconnects have been reported on the NETLINK lists (no reasons given for disconnecting), and 13 of those were immediately placed back into service.

If there is further information I may be able to supply, please let my know.

Sincerely,

James Johntz
Adminstration

NORTHWEST TELEVISION, INC
P.O. Box 2, 1007 West Jefferson, Boise, Idaho 83701
(208) 336 5223 • FAX (208) 336 9163

KXTV

June 25, 1991

Gregory M. Schmidt, Esq.
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Suite 705-A
Washington, D.C. 20044

Dear Mr. Schmidt:

As a CBS affiliate, we were asked by Bill Murdoch, White Space Committee Chairman of CBS, to refer to you our thoughts on the problems we are having with the satellite carriers regarding the Home Satellite Viewing Act.

A primary problem experienced here at KXTV is the deletion and addition of subscribers by the carriers within the same month. We suspect this is simply a subscription renewal method and the deletion aspect has no bearing on the Home Viewer Act. Because we maintain a separate sheet in our files for each subscriber we have challenged, additional work is required in keeping up with the mailings.

The addition and deletion lists we receive contain, at times, incomplete addresses and misspellings of the city names. We are then faced with the question of whether we should stay with their spelling since it is in their computer in that fashion, or make a correction on our form.

About two dozen viewers have called on the telephone regarding forms they have received from Netlink. They have said that Netlink was going to disconnect their service and they wanted to know whey we (KXTV) had requested it. The law was explained to the viewer and in most cases the call ended in an amicable fashion. This indicates that Netlink is responding to the Home Viewer Act, at least in some limited fashion, but we have heard from no viewers using other carriers.

We have approximately 130 suspected violations with a Sacramento address, and more than triple that within our viewing area.

Enclosed is the only correspondence that we have received from the carriers.

If you need any additional information please don't hesitate calling me.

Sincerely,

Fredrick A. Lindsay

Fredrick A. Lindsay
Asst. Chief Engineer

FAL/jt

cc: Bill Murdoch
CBS Network

ATTACHMENT B

(Submitted to PrimeTime 24 in June 1991)

AN ANALYSIS OF PRIMETIME 24'S FAILURE TO COMPLY WITH THE HOME SATELLITE VIEWING ACT AND RECOMMENDED SOLUTIONS

I. Advertising And Promotion

A. The Problem

PrimeTime 24's advertising and promotional materials fail to disclose adequately the statutory eligibility requirements for satellite service. The advertisement in Attachment 1 which is used by PrimeTime 24 is illustrative. It states:

> "PrimeTime 24 is available in all areas where network channels are not clearly received."

That statement is misleading in that (a) it fails to disclose that satellite service is available only for private home viewing; (b) it suggests that the inability to receive all three network signals will qualify a subscriber for satellite delivery of one or more network signals; and (c) it fails to disclose that even though a specific local network affiliate may not be clearly received off-the-air, satellite service is not available if the subscriber received that network signal by cable within the preceding 90 days.

B. Recommendation

PrimeTime 24 should include in each advertisement a simple statement summarizing the eligibility requirements. For example, the inclusion of the following in each promotional advertisement would suffice:

> "PrimeTime 24 provides satellite service of ABC, CBS and NBC programming only for private home viewing. Service of any one of these network signals may be made available only to those homes that (a) cannot receive that network from a local station off-the-air with a conventional rooftop antenna and (b) have not received that network by cable television within 90 days before satellite service begins."

II.
Subscriber Pre-Screening Procedures Used By PrimeTime 24's Customer Service Representatives

A. The Problem

PrimeTime 24's customer service representatives ("CSRs") fail to fully inform potential subscribers of the statutory service eligibility requirements. Affiliates of all three networks routinely report the existence of subscribers well within their Grade B and Grade A contours, some of whom are located within sight of their towers and for whom there are no terrain or other obstructions to impair reception. A telephone call to PrimeTime 24's 800 service number will confirm the inadequacy of its subscriber pre-screening procedures.

A portion of the script used by PrimeTime 24's CSRs appears in Attachment 2. The script is deficient in several respects: (a) it fails to inquire whether the service will be used for private home viewing; (b) it does not inquire into the adequacy of over-the-air service from each network, separately, and therefore is destined to create confusion among subscribers about their eligibility to receive a particular network; and (c) it cleverly, but deceptively, glosses over the signal reception requirement.

B. Recommendation

When service inquiries are received, PrimeTime 24's CSRs should inform potential subscribers of all the statutory service eligibility requirements in clear, concise terms. The script which appears in Attachment 3 is recommended.

In light of the experience to date with telephone screening, prospective subscribers should be compelled to apply for service in writing on a prescribed questionnaire which both recites the statutory restrictions on eligibility and assures that the pertinent data is obtained up front. In addition to the obvious points, the questionnaire should include such matters as whether the applicant has a functioning over-the-air antenna as well as a dish; what impediments to the over-the-air reception the applicant is aware of; whether the residence has subscribed to cable television within the preceding 90 days; where the applicant's dish is or will be located (with specific address information); whether the dish is intended to be used by the same party who is executing the application; and whether the dish is to be used for private home viewing or in a

commercial establishment. Executed questionnaires should be furnished to the pertinent local affiliate before the service is connected.

III.
Inadequate Identification
Of The Location Of The Dish

A. The Problem

PrimeTime 24 has refused to provide the networks and their affiliates with the "names" of subscribers, arguing that the Act does not require it. While Section 119(a) of the Act does not require that the names of subscribers be furnished, both the House Judiciary and Commerce Committee Reports accompanying the Act do. Both Reports state that the Act requires the "names" of subscribers to be furnished to the networks. [See, H.R. Rep. No. 887, 100th Cong., 2d Sess., part 1, at 18 and part 2, at 20 (1988).] PrimeTime 24's failure to include the names of its subscribers makes it impossible for local stations to determine without making a door-to-door check whether the subscriber is a commercial establishment or a private residence and is expressly at odds with the intent of Congress as stated in the House Judiciary and Commerce Committee's Reports.

Moreover, PrimeTime 24 has in the past identified urban subscribers by post office box rather than by "street address." Section 119(a)(2)(c) of the Act requires that subscribers be identified by "street address," "county" and "zip code." PrimeTime 24 promised one of the networks (ABC) in May 1990, that in the future it would supply

the networks and affiliates with the street addresses of its subscribers, not post office box numbers. PrimeTime 24, however, has not agreed to go back and correct its earlier subscriber lists.

Affiliates have also encountered difficulty in locating rural subscribers who are identified by an RFD number. PrimeTime 24 has refused to supply along with the RFD number any descriptive information (e.g., "located 5 miles from Centerville on Highway 24"). While the statute does not require descriptive information (PrimeTime 24 claims that if the post office department can locate these people, local affiliates can), Prime-Time 24's CSRs could easily obtain such information from a rural subscriber at the time service is requested. This information could, of course, easily be incorporated into the subscriber lists furnished by PrimeTime 24 to the networks.

B. Recommendation

First, PrimeTime 24 should furnish the name of each subscriber, along with the address. Second, the address for each urban subscriber should be a street address, not a post office box. Third, when an RFD address is provided for a rural subscriber, PrimeTime 24 should obtain and furnish brief descriptive address information. Fourth, PrimeTime 24 should go back and correct the deficiencies in this regard for all subscriber lists submitted earlier.

IV.
Investigation And Verification Procedures

A. The Problem

Attachment 4 contains the letter and questionnaire PrimeTime 24 now sends to each subscriber when the subscriber's service eligibility is challenged by a local affiliate. The letter and questionnaire represent a significant improvement over the procedure PrimeTime 24 formerly used. Unfortunately, it is not clear whether PrimeTime 24 plans to go back to subscribers previously challenged to furnish them with this new letter and questionnaire.

PrimeTime 24 has not been willing to furnish affiliates (or their networks) copies of the completed questionnaires received from subscribers who have been challenged or the names and addresses of challenged subscribers who fail to respond to the questionnaire.

The Report of the House Judiciary Committee accompanying the Satellite Home Viewer Act clearly requires satellite carriers to furnish this information. It states:

> "[T]he carrier [should be] . . . reasonably diligent in avoiding and correcting violations through an internal compliance program that includes methods of confirmation of household eligibility such as customer questionnaires, sample site signal measurements, and periodic audits, all of which must be served upon each network, which may utilize such information or share it with others solely to monitor the distributor's compliance with the statute." [H.R. Rep. No. 887, 100th Cong., 2d Sess., part 1, at 19 (1988).] [Underlining supplied.]

Not only has PrimeTime 24 refused to provide the networks with its audit materials, it has acknowledged that it does not attempt to confirm and verify the eligibility of every subscriber challenged by affiliates. Instead, it only checks a "random sample" of the challenged subscribers, a process that is obviously at odds with the statute.

Moreover, where a challenged subscriber is asked to confirm his eligibility and fails to complete and return the questionnaire, PrimeTime 24 "assumes" the subscriber to be qualified and does not follow up nor does it discontinue service to that subscriber.

Finally, it does not appear that PrimeTime 24 undertakes any "site measurements" as the House Judiciary Committee Report expressly contemplates.

Plainly, PrimeTime 24's verification and audit procedures do not comport with the statutory requirements.

B. Recommendation

PrimeTime 24 should

(a) Send all subscribers whose eligibility has at any time been challenged the current version of the letter and questionnaire which are now used to confirm subscriber eligibility.

(b) Promptly furnish to the appropriate local affiliate a copy of the questionnaire after it has been completed and returned by each challenged subscriber.

(c) Promptly furnish to the appropriate local affiliate the name and address of each challenged subscriber who fails to respond to the questionnaire within 30 days. If a subscriber fails to respond within 30 days, PrimeTime 24 should promptly terminate the service.

(d) Promptly furnish to the appropriate local affiliate the name and address of each challenged subscriber whose service is disconnected and the name and address of each challenged subscriber whose service is not disconnected.

(e) Discontinue its "random sampling" of challenged subscribers. PrimeTime 24 should send <u>every</u> subscriber who is challenged by an affiliate a letter which advises him of the challenge and request him to return the completed questionnaire.

(f) Finally, the House Judiciary Committee Report contemplates that satellite carriers will conduct "sample site measurements" to confirm the eligibility of subscribers. There is no indication that PrimeTime 24 has ever undertaken "site measurements."

V.
Grandfathered Subscribers

A. The Problem

Notwithstanding the exchange of correspondence and discussions with PrimeTime 24 by all three networks, confusion continues to exist as to those subscribers who qualified for grandfathering status.

B. Recommendation

PrimeTime 24 should furnish the appropriate network the names of all grandfathered subscribers receiving that network's service with the date on which the subscriber began to receive the service. The name and date will serve to confirm and verify the eligibility of each subscriber for grandfathered status and whether the service is being used for private home viewing.

VI.
Physical Form Of
Subscriber List Materials

A. The Problem

The physical form of the subscriber lists is inadequate. The networks and their affiliates would like to use an electronic scanner to convert PrimeTime 24's hard copy to electronic data. However, because of the form in which it is submitted, much of the

data furnished by PrimeTime 24 cannot be scanned. The material, more often than not, consists of

* "Dirty" photocopies of green bar paper or photocopies with streaks, blurs and other markings and often in letters too pale to read, much less scan by electronic means. Some look like fourth or fifth generation copies;

* Photocopies consisting of two pieces of paper cut and pasted and copied onto a single page and irregular in form;

* Reports written in hand or when typed, in "mouse print" type too small to read; and

* Reports prepared in different formats on different sized paper.

B. Recommendation

PrimeTime 24 should furnish the material in a form that will permit it to be electronically scanned.

VII.
PrimeTime 24's Enforcement And Follow-Up Procedures

A. The Problem

As noted earlier, uncertainty and confusion exists among the networks and their affiliates over what actually happens once a subscriber is challenged. The feeling is that an affiliate's challenge, once made, often falls in a "black hole" and nothing happens. Affiliates need to know whether a challenge is accepted or rejected and if rejected, why.

B. Recommendation

As suggested earlier, PrimeTime 24 should supplement its periodic addition and deletion lists by furnishing to each local affiliate a response to each challenged subscriber. The response should indicate whether the subscriber was disconnected and if so, the date of the disconnection, and if not, why the challenge was rejected.

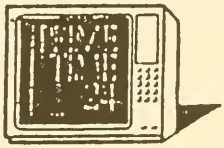
* * *

ATTACHMENT 1

ABC

ABC
IMPROVED

Only PrimeTime 24 delivers prime stations from prime locations. PrimeTime 24 broadcasts WABC–New York straight from the Big Apple, delivering your favorite programs at convenient Eastern/Central prime times. You'll enjoy prime time programs, the most popular game shows, talk shows, sports and local news. Set yourself up for complete, uninterrupted programming of ABC . . . improved.



Prime Stations. Prime Locations.

WXIA (NBC–Atlanta), WABC (ABC–New York), WBBM (CBS–Chicago).

1-800-248-2844

PrimeTime 24 is available in all areas where network channels are not clearly received. PrimeTime 24 is a service mark of PrimeTime 24 Joint Venture.
© 1990 PrimeTime 24 Joint Venture.

Attachment 2

CSR SCRIPTS

<<Answer the phone by the second ring!>>

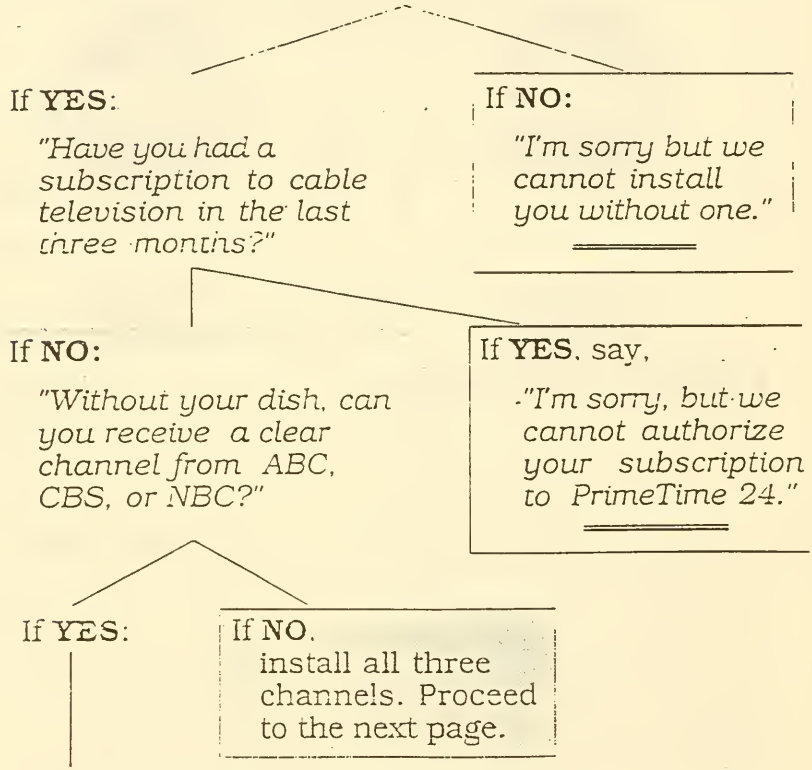
"Good morning <afternoon, evening>,
Thank you for calling PrimeTime 24.
My name is _____.
How may I help you?"

If a customer wants information:

"PrimeTime 24 is a package of ABC, CBS, and NBC superstations for home satellite dish owners. It brings you ABC from New York (that's WABC), CBS from Chicago (that's WBBM), and NBC from Atlanta (that's WXIA). You'll get all the network programming like 'The Bill Cosby Show', '60 Minutes', and 'Moonlighting', plus great syndicated shows such as 'Wheel of Fortune', 'Oprah Winfrey', and 'The People's Court'. All three channels are in stereo on satellite F2, and the subscription rates are $49.95 for one year, $90 for two years, or $130 for three years."

If a customer wants to order service:

1. Ask, *"Do you have a VideoCipher II descrambler?"*

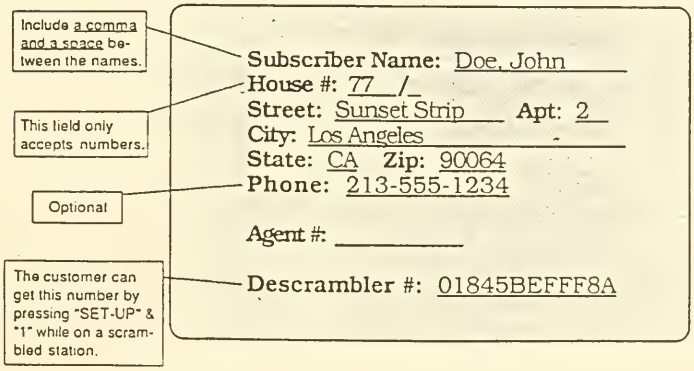

If YES:
"Have you had a subscription to cable television in the last three months?"
If NO:
"I'm sorry but we cannot install you without one."
If NO:
"Without your dish, can you receive a clear channel from ABC, CBS, or NBC?"
If YES, say,
"I'm sorry, but we cannot authorize your subscription to PrimeTime 24."
If YES:
"Which channels can you get without your dish?"
If NO, install all three channels. Proceed to the next page.

You can install the customer for any channel which he cannot get. Proceed to the next page.

2. Ask, *"Have you ever had any of our services before?"*

If **NO**, then install him as follows:

- Go to the Main Menu.
- Type "1" and press "enter".
- Type in the information, including the physical address of the dish, not the mailing address:


Include a comma and a space between the names.
This field only accepts numbers.
Optional
The customer can get this number by pressing "SET-UP" & "1" while on a scrambled station.
Subscriber Name: Doe, John
House #: 77 /
Street: Sunset Strip Apt: 2
City: Los Angeles
State: CA Zip: 90064
Phone: 213-555-1234
Agent #:
Descrambler #: 01845BEFFF8A

- Press "enter".
- Press "enter".

•This is the "CR" screen. You may choose to make a notation here before you press "Enter". If you do, then an astensk ("*") must be placed after the name of the customer (using the "CM" screen -- see pg 14).•

- Type "I" under the appropriate service code.

•Subscriber service codes are listed on page 11.•

- Go to Step 3 on page 10.

If **YES**, go to the next page.

Federal law permits the satellite delivery of each network broadcast signal only for private home viewing. By law, a network's signal may be delivered by satellite only to a home that cannot receive that signal with a conventional rooftop antenna from a local station and which has not received that network's signal by cable within the last 90 days. In connection with this requirement, I am going to ask you several questions to make sure your satellite dish qualifies for the network service you desire:

1. First, do you use your satellite dish for private home viewing?

   _____ Yes _____ No

   Comment: If the answer is no, the potential subscriber is ineligible by law to receive any broadcast network service. If the answer is yes, then the following additional questions should be asked.

2. Do you now or have you in the past had a conventional outdoor rooftop antenna installed and working at the address where your satellite dish is located?

   _____ Yes _____ No

   Comment: If the answer is no, then the potential subscriber, in all probability, is ineligible because under Section 119(d)(10) of the Act, an "unserved household" is one that cannot receive a measured Grade B with a "conventional outdoor rooftop antenna." If the answer is yes, then the following should be asked, separately, as to each of the ABC, CBS and NBC Networks.

3. Using the rooftop antenna, are you able to receive an adequate ABC Network signal which is substantially free of interference?

   _____ Yes _____ No

   Comment: If the answer is yes, then the potential subscriber is ineligible by law to receive that network, and the CSR should then ask the question (again, separately) as to CBS and NBC Network service.

4. What is the specific problem you are having?

   Comment: This will help in verifying the subscriber's eligibility.

5. What, in your opinion, is the reason you cannot receive an adequate ABC Network signal?

   Comment: The CSR may discover that the antenna is not working or that it has been disconnected, or that a defect in the subscriber's channel selector switch is the cause of the reception difficulty.

Attachment 4

PRIME TIME 24

342 Madison Avenue Suite 1520 New York, NY 10173
(212) 599-4440 Fax: (212) 599-2402

Dear Subscriber:

Because ABC has questioned your eligibility to receive WABC (ABC) as part of your PrimeTime 24 subscription, PrimeTime 24 is required to ask you to verify your eligibility in writing. Please take a few minutes to read through the eligibility requirements and send back the enclosed card within ten (10) days.

Under the Satellite Home Viewer Act of 1988, our customers may purchase subscriptions to ABC or other network programming via satellite, provided that they meet some eligibility rules: (1) the household where the dish is located cannot have subscribed to cable service within a period of 90 days prior to the household's satellite subscription and (2) the household is unable to receive an acceptable over-the-air signal from an ABC-affiliated television station.

An acceptable over-the-air signal means a television picture that is free of "snow", "ghosting" and other objectionable interference when viewed without a dish through a typical rooftop antenna.

Please return a signed copy of the enclosed eligibility verification card within ten (10) days. If we do not receive it, your service may be interrupted.

Thank you for your cooperation.

1. We did not have a subscription to cable television in this household within 90 days before we subscribed to PrimeTime 24.

2. We do not receive an acceptable over-the-air ABC signal with a typical rooftop antenna as a result of: ghosting ____, snow ____, other interference ____ (check one or more as applicable). If other interference applies, please describe: _____

_____

If your household does not presently have a conventional rooftop antenna, please answer the above based on your past experience with a rooftop antenna at your household location.

3. My PrimeTime 24 subscription is solely for personal use within my household.

4. I represent that the above statements are true and correct.

PRIME TIME 24

Name _____ *(please print)*

Signature _____ Date _____

ADDRESS _____

_____

_____

If the address on this card is a P.O. Box without a rural route number, ABC would also like a description of the location of your household. That description will enable ABC to complete its view of your reception at your household. Please provide it in the following space:

_____

_____

Code # _____ Account # _____

Date of Subscription _____

Mr. HUGHES. I just have one question. How is the best way for us, do you think, to resolve the question, through statutory changes in the law or informal meetings among the various parties? What is your judgment?

Mr. HARGROVE. I think it would be very helpful if the parties could exhaust their efforts first to try and reach an agreement on what needs to be done, and then come to you and the subcommittee with a recommendation.

Mr. HUGHES. We have done that in the past and that has worked fairly well.

Mr. HARGROVE. We did.

Mr. HUGHES. We will try to work with you and others and see if we can't accomplish that.

Mr. Padden, I gather from reading your statement that your position is basically you would rather not see us pass the legislation. But if we do pass the bill to deal with the satellite problem and particularly the wireless problem in order to level the playing field that we do it in the context of phasing out compulsory licenses. Is that basically where you are?

Mr. PADDEN. Our position is we would like to see the license phased out.

Mr. HUGHES. I understand.

Mr. PADDEN. We think that is the best policy, and we think that if any legislation is going to past dealing with a license it should include as a part of it a phaseout.

Mr. HUGHES. You know, we also have to be realistic. These folks are on the outside looking in. They have been excluded because of an unfortunate interpretation by the Copyright Office that they are not cable systems.

Mr. PADDEN. I think the danger is that there will always be—the Congress will always have the capacity to expand and extend the scope of these rights being—private rights being licensed statutorily and it will be difficult for the Congress to ever summon the will to get out of the marketplace. But, as I think your earlier comments indicated, it is going to get—and as some of the earlier testimony indicated, it is getting trickier and more complicated, and every day the marketplace evolves some more. And you know licensing and pricing of television programs of different kinds from different kinds of stations through different kinds of media is not a process well suited to the speed of government processes, and our fear is that if you go with just the bill you have got before you, we will never get around to phasing out the license.

Mr. HUGHES. Well, the problem is, however, that if you don't do something about some of these evolving technologies to protect them and make sure that they are in the game, so to speak, they may not survive.

Mr. PADDEN. Well, but I think that sound public policy urgency might be usefully employed to help move a broader based bill.

Mr. HUGHES. Now you are trying to be logical on us, and logic never prevails around here. I share your concern about phasing out compulsory license. That is clearly, I think, the answer. But in the near term until that is done we have some problems we need to deal with, and we will have other problems that we will have to deal with if we don't phase it out.

Mr. PADDEN. I guess we believe that it would be worth the effort to try to move a broader bill in the first instance. Try, you know, to hold the feet of all the private parties as tightly to the fire as you can and see if we can't get it moving.

Mr. HUGHES. I appreciate that. It is a very constructive suggestion.

Yes, Mr. Hargrove?

Mr. HARGROVE. Mr. Chairman, you raised a question earlier which should be addressed, and that is, whether the compulsory license is extended to wireless cable, whether a white area exception should apply to wireless cable. We need to think about that. My sense is, that it should be. It certainly would not be appropriate for wireless cable to have any service advantage over satellite service or over cable for that matter. We look forward to working with you on that.

Mr. HUGHES. I appreciate that.

Mr Padden, just one more question. Your statement refers to the fact that you have gone from a 2-night network to a 7-night network. Do you contemplate that Fox will be considered a network under the new FCC rules? And, if so, how will that affect the white area provisions in section 119.

Mr. PADDEN. Well, there are at least five or six definitions of the word "network" in the FCC rules, and we are considered a network under most of those definitions. For example, in implementing the new Cable Act just last week the FCC made a decision that we will be a network for the purpose of the provision that requires cable operators to carry the closest network affiliate. They decided that Fox is a network for that purpose.

Mr. HUGHES. I appreciate it. Well, thank you very much. The panel has been very helpful.

Does the gentleman from California have any questions?

Mr. EDWARDS. I have one question. Thank you, Mr. Chairman.

Mr. Padden, it is a very important question too. I live at the Watergate and we have Washington Cable Co. Now, it is not really a cable company because it has a dish on the roof. Your company has been developing rapidly. You know, there is a wonderful news program in the morning a lot of us watch. And you have the only program in town, in Washington, DC, that is from 10 to 11, 7 days a week, which most of us watch. But we can't get it.

Mr. PADDEN. Well, Mr. Edwards, I can assure you that we are very eager for you to be able to watch our programming and our commercials, and I will personally see to it that that situation gets fixed. I can't imagine what the problem is, but we will——

Mr. EDWARDS. It is really infuriating to think that the Nation's Capital doesn't have real cable too. You might take care of that while you are at it.

Mr. PADDEN. That might be a little beyond my purview, but I promise we will get a signal into the Watergate, and I will get back to you directly on that.

Mr. EDWARDS. Well, thank you very much.

Mr. HUGHES. That is the best testimony I have heard in this committee. You might want to separately tape that. That might be a good commercial for you, Mr. Padden.

Mr. PADDEN. And then we could apply to you for a compulsory license to use it.

Mr. HUGHES. It has possibilities. Thank you very much. I appreciate your contribution.

We are going to have to recess until 1 o'clock sharp and we will complete the testimony for today.

The subcommittee stands recessed until 1 p.m.

[Recess.]

Mr. EDWARDS [presiding]. The subcommittee will come to order.

Our final witness, and a very important one, is Alan Sonnenberg, chairman of the board and CEO of ACS Enterprises, appearing on behalf of the Wireless Cable Association International, Inc. The Wireless Cable Association has been in the forefront of the efforts to include wireless within the copyright compulsory license, and we are grateful for your appearance today.

Mr. Sonnenberg, we have copies of your testimony. We have read the testimony and all of your testimony will be made a part of the written record. We welcome you and you may proceed.

STATEMENT OF ALAN SONNENBERG, CHIEF EXECUTIVE OFFICER AND CHAIRMAN, ACS ENTERPRISES, INC., BENSALEM, PA, ON BEHALF OF THE WIRELESS CABLE ASSOCIATION INTERNATIONAL, INC.

Mr. SONNENBERG. Thank you. I would like to thank the committee for having me here. Over the last 18 years, when I started the company ACS, we have been referred to as many things. We have been called MATV, SMATV, MDS, MMDS, private cable, now wireless cable. Of course, in reading the newspaper reports I think we may have to change our name to fiberless cable soon. But nonetheless, regardless of what we are called, we are providing an alternative service to our subscribers. In the Philadelphia market, which is growing daily for us, we are providing an alternative service to 2.2 million households. We are currently increasing our subscriber base by over 2,000 subscribers a month. This, in part, was created through the Cable Act that has just been passed back in October, and what is really important for operators like ourselves is we need to have access to programming. And taking away the potential of the compulsory license for wireless, essentially, would almost put us out of business. It would create another barrier where the spirit of Congress has spent so much time in encouraging competition.

Many people have come to Congress asking for something special, special consideration. I am not, and I know our industry is not. All we are asking for is the ability to provide our service to markets on an equal footing. We need fair access under the same terms and conditions as everybody else.

The interpretation of the compulsory license—there is no public interest served with their interpretation as it is right now. Alternative technologies should be able to enjoy the compulsory license. I heard several comments made from some of the other people that there need to be changes in the distribution of the funds on the copyright or maybe other changes that need to be taking place. That is fine. We are not against that. We will support that as long as it is fair to everybody.

Being all the names that I called earlier, and I will add that with all the names we are called, some of the cable companies today, our competitors, are calling us some names that I do not want to repeat here in the hearing. But nonetheless, as an MATV or an SMATV or a wireless operator, we have always had to fight in order to have a level playing field. We are so close to having that level playing field now. The compulsory license, if it is not passed in the form as proposed, could potentially derail the process even further.

We are approaching a new century where competitive communications services are going to be available. Do not allow a formalistic, rigid and, candidly, wrong interpretation of the compulsory license derail that competitive ability. Not only do I apply the efforts of Congressmen Boucher, Moorhead, and everybody else in this room, but the spirit of Congress to encourage competition today and tomorrow. I have only asked for equality, not special treatment.

On behalf of the WCAI I urge you to move this legislation as soon as possible. The uncertainty hanging over our head impedes the full emergence of wireless cable today.

Thank you.

Mr. EDWARDS. Well, thank you.

[The prepared statement of Mr. Sonnenberg follows:]

PREPARED STATEMENT OF ALAN SONNENBERG, CHIEF EXECUTIVE OFFICER AND CHAIRMAN, ACS ENTERPRISES, INC., BENSALEM, PA, ON BEHALF OF THE WIRELESS CABLE ASSOCIATION INTERNATIONAL, INC.

Testifying on behalf of the Wireless Cable Association International, Alan Sonnenberg expressed strong support for rapid enactment of H.R. 1103 and H.R. 759—legislation that would assure the wireless cable industry uninterrupted use of the cable compulsory license to retransmit broadcast programming to consumers.

This legislation has been introduced through the bipartisan efforts of the House Judiciary Committee, Intellectual Property Subcommittee and Representative Rick Boucher—a former member of the Subcommittee who has been a vigorous supporter of a technology-neutral compulsory license. Today's hearing marks the third time the Wireless Cable Association International has appeared before the Subcommittee to address the need for this clarifying legislation.

In his testimony today, Alan Sonnenberg said this modest amendment will ensure that the compulsory license is available on a technology-neutral basis and will help ensure that the alternative video transmission technologies will be able to provide competition to the cable television industry.

Since the passage of the Cable Act in the 102nd Congress, wireless cable is rapidly becoming the primary alternative to cable, providing a competitive option to consumers of multichannel video, and it is critical for the wireless cable industry to have the compulsory license to provide a complete line-up of programming channels for consumers.

Last year, the United States Register of Copyrights erroneously concluded that under present law the wireless cable industry is not entitled to the use of the compulsory license. However, the Register delayed the effective date of the interpretation of the law until 1994 in order to give Congress an opportunity to avoid any disruption in the marketplace.

Today's hearing on the compulsory license clarification legislation demonstrates that the Congress is moving forward on a timely basis to adopt legislation clarifying the eligibility of wireless cable systems for the compulsory license. The full resources of the Wireless Cable Association International were pledged in support of the bipartisan efforts of Congress to pass this legislation.

While the future of Section 111 of the so-called cable compulsory license is itself a subject of Congressional debate, the Wireless Cable Association International is confident that the House and Senate are strongly committed to keep the cable compulsory license available to wireless systems on a technology-neutral basis during the course of the debate.

Mr. EDWARDS. Will you explain to us what wireless cable is?

Mr. SONNENBERG. There are 33 channels available through the Federal Communications Commission for simultaneous distribution. They are referred to as microwave channels. They are broken down into 20 of the channels are educational frequencies and the other 13 channels are commercially available frequencies. One thing that wireless is offering, we are doing in the city of Philadelphia as other wireless operators are across the country is we are providing millions of dollars to education in our markets. Not only are we providing a distribution means for educators to be able to provide their programming, but we are supporting them with funds, because we are leasing their excess air time.

Mr. EDWARDS. Well, are you wireless?

Mr. SONNENBERG. Yes. Wireless in the capacity that we do not have a distribution network as the historic cable company does today. We have a headend. We have a transmitter. And then we have a receiving antenna that is placed on the subscriber's home. From there we do run a coaxial cable to the subscriber's television set.

Mr. EDWARDS. Why don't the subscribers use regular cable? You are competing with the conventional cable systems.

Mr. SONNENBERG. Correct.

Mr. EDWARDS. Are you duplicating their service?

Mr. SONNENBERG. We have streamlined their service. I don't really make it as a comparison with the local channels that we are making available to the people in Philadelphia. We are 36 channels that we are providing to our subscribers. For $23.95 a month we provide the subscriber with basic service and their choice of a premium service. The net result in our area is we are 25 to 40 percent lower than our cable competitors. So that is really what we are providing to the subscriber. We are low cost. Our picture quality is excellent.

Service problems I am not going to tell you are nonexistent, but what is nonexistent is we have eliminated the miles of cable, the amplifiers, the passive devices, everything involved in a cable distribution network that can potentially break down. The cable system is built, it is almost like a pipeline. As soon as something stops the flow of the signal, hundreds or potentially thousands of people are without service. We have eliminated in wireless the need for that distribution network. We are back to basics. We are almost going back to where this all started from, back to over-the-air broadcasting.

Mr. EDWARDS. Do you have to pay the same licensing fees from the suppliers as your, we will call them competitors just for the lack of a better word?

Mr. SONNENBERG. We are not even close in many of the programming services today to the same rates as the cable companies. We are much higher. And, even with that we are able to afford to our subscribers a lower retail rate.

Mr. EDWARDS. Will they negotiate lower prices? You take advantage of the compulsory license?

Mr. SONNENBERG. Today, yes. But that is only for the network channels.

Mr. EDWARDS. Why wouldn't you negotiate as Mr. Padden said? Do you feel that you would be at a disadvantage without the com-

pulsory license provisions in Federal law, and therefore could not negotiate your costs?

Mr. SONNENBERG. If, in fact, everybody has to follow those same ground rules and exclusivity is not the issue, absolutely I would negotiate.

Mr. EDWARDS. Well, I have a couple of other questions, Mr. Sonnenberg, but I will yield to the gentleman from California, Mr. Becerra.

Mr. BECERRA. Mr. Chair, thank you very much. Since I did come late I would rather just go ahead and listen because I really have not been able to hear all the other witnesses' testimony. So I will turn it back to you. Thank you.

Mr. EDWARDS. All right. Thank you, Mr. Becerra.

Now, your industry, Mr. Sonnenberg, sought to persuade the Copyright Office to accept statements of account for section 111, H.R. 1103 and H.R. 759, as the answer of your legislative——

[Pause.]

Mr. EDWARDS. Do these bills take care of your problem?

Mr. SONNENBERG. Yes.

Mr. EDWARDS. Well, based on your experience with section 111 since 1986, is there any compelling reason why wireless should not be included within section 111?

Mr. SONNENBERG. Not at all.

Mr. EDWARDS. Why is this legislation important to you as a businessman?

Mr. SONNENBERG. We have been trying to get wireless up and running in the Philadelphia market for 3 years now. It is ironic if you look at the chain of events for our industry. In December 1992, after the cable bill was passed, we completed a secondary public issue raising over $11 million for ACS to build wireless. Three other systems were able to find senior financing, and that was because of the Cable Act.

The reason for it is every time we try to get wireless up and running in markets we kept getting questions from the senior lenders, equity players that would be questions such as, Well, there is no assurance that you are going to have your programming. The subscribers do not just want to view ESPN, HBO, et cetera. Local network channels, local programming is very important. So it is almost that the Cable Act has taken care of what was perceived the biggest part of the problem, and then all of a sudden now we are faced with an issue that the local channels may not be available to us.

Mr. EDWARDS. So that is why you want the compulsory license provisions to continue?

Mr. SONNENBERG. Yes.

Mr. EDWARDS. But you would still pay more than your competitors?

Mr. SONNENBERG. That is correct.

Mr. EDWARDS. Well, why would a household subscribe to your service when they could subscribe to one of the—we will say the larger cable companies?

Mr. SONNENBERG. Larger isn't necessarily better. Even when it comes down to programming, we, as I said earlier, have a 36-channel offering. Many people are not interested in 70, 80, 100 chan-

nels. Sometimes it becomes more confusing. Once they figure out what they want to watch, the show is already over. We provide a basic service and a premium package that is priced well and it is—you happened, I think, earlier mentioned about Fox network in your building. We happen to offer that service, which is on a UHF channel in Philadelphia.

But not everybody wants to have all of the channels. We have the Cable News Network service. We have ESPN. We have the USA Network. And for those subscribers that are interested in saving money and getting the products that they want to see, that is what we are there for. And quite frankly, we are doing very well with it.

Mr. EDWARDS. You don't rely on dishes on the roof?

Mr. SONNENBERG. Of the individual home?

Mr. EDWARDS. Yes.

Mr. SONNENBERG. Not satellite dishes. We have satellite dishes at our transmitting location or our headend, and then we have a small 18-inch antenna we install on the subscriber's home.

Mr. EDWARDS. Since we don't have a minority member here, Mr. Mooney, do you have a question?

Mr. MOORHEAD. No, Mr. Chairman. Thank you.

Mr. EDWARDS. Counsel.

Mr. BECERRA. Mr. Chair, I have a question.

Mr. EDWARDS. Yes, Mr. Becerra?

Mr. BECERRA. Mr. Sonnenberg, just one quick question. I believe I may have gotten the answer from counsel here. But do you see any difference between the definitions provided in the two bills with regard to the wireless systems and, perhaps, their applicability to section 111?

Mr. SONNENBERG. No. I believe that the interpretation of other technologies in section 111 really was addressing future services or future competition like ourselves.

Mr. BECERRA. Do you feel any more comfort level with one versus the other?

Mr. SONNENBERG. No, not really, although I heard earlier testimony. It seems that the major issue is the distribution of the dollars, how it is being charged in order to collect the copyright fees, which seems to have been the bigger part of the issue. I can't really address that, you know, one way or the other.

Mr. BECERRA. But, as far as you are concerned, either definition in the two bills is suitable?

Mr. SONNENBERG. Yes.

Mr. BECERRA. Thank you. Thank you, Mr. Chair.

Mr. EDWARDS. Thank you, Mr. Becerra. Well, Mr. Sonnenberg, you have been very helpful. We regret that we delayed you a little bit, but I think your testimony was very important and we thank you.

We are going to hold the record open for 10 days for anything further. If you have some second thoughts, send them along. We will make them a part of the record, Mr. Sonnenberg. And that goes for all the witnesses.

I believe that winds up our hearing for today. Once again we are grateful for all the witnesses. And, Mr. Sonnenberg, thank you very much.

Mr. SONNENBERG. Thank you very much.

Mr. EDWARDS. The subcommittee is adjourned.

[Whereupon, at 1:20 p.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

APPENDIXES

APPENDIX 1.—LETTER FROM G. TODD HARDY, ESQ., HARDY AND ELLISON (WITH ATTACHMENTS), TO HON. WILLIAM J. HUGHES, CHAIRMAN, SUBCOMMITTEE ON INTELLECTUAL PROPERTY AND JUDICIAL ADMINISTRATION, MARCH 25, 1993

MAR 2 9 1993

RECEIVED

MAR 2 9 1993

Sub on Courts

HARDY & ELLISON, P.C.
CONSULTING ATTORNEYS
SUITE 100
9306 OLD KEENE MILL ROAD
BURKE, VIRGINIA 22015
(703) 455-3600
TELECOPIER (703) 455-3603

G. TODD HARDY
(ADMITTED IN D.C. & VA.)
(703) 455-3601 DIRECT

MARK C. ELLISON
(ADMITTED IN FL & GA ONLY)
(703) 455-3602 DIRECT

March 25, 1993

Congressman William J. Hughes
241 Cannon House Office Building
Washington, D.C. 20515-3002

Re: H.R. 1103

Dear Chairman:

This letter and the attached letters of August 1 and 19, 1991 are offered for the record of the March 17, 1993 hearing regarding H. R. 1103, in addition to testimony and materials supplied by Janet Foster and at her request.

It is unfortunate that this communication is necessary in the midst of your efforts to effect a very necessary and simple extension of the Satellite Home Viewer Act. In light of the outdated materials supplied to your Subcommittee by Wade Hargrove on behalf of the newly formed "Network Affiliated Stations Alliance" and the related testimony that PrimeTime 24 has not been "fully cooperative", this additional offering was unavoidable.

Contrary to the impressions left by Mr. Hargrove on March 17, PrimeTime 24 has cooperated fully in attempts to privately resolve differences of opinion regarding "white area" sales. The enclosures to this letter recount good faith discussions between the networks and PrimeTime 24 that began in 1989 and ended in 1991 after PrimeTime 24 responded to the materials Mr. Hargrove offered to the Subcommittee last week.

In the enclosed August 1991 proposals, PrimeTime 24 included recommendations to Mr. Hargrove and each of the networks for mutual improvements in the "white area" coordination process under the existing Act. More than a year and a half later, PrimeTime 24 has not heard from any of the networks in reponse to its proposals.

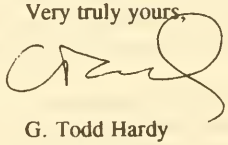
In the interim, PrimeTime 24 unilaterally adopted many of the changes in the reporting and processing procedures that were suggested in 1991; a fact that was effectively lost in Mr. Hargrove's testimony last week. For example, customer qualification questions were reworded and geographic descriptions were provided whenever addresses did not pinpoint subscriber locations. Corresponding changes in the procedures of the network affiliates have not been apparent, even though specific constructive suggestions were offered by PrimeTime 24 in 1991.

Outstanding issues that remain as "core" concerns to the affiliates, according to Mr. Hargrove last week, were addressed by PrimeTime 24 almost two years ago in the enclosures. For example, subscriber proximity to broadcasting towers, signal theft by bars and site measurements were all the subject of specific and constructive comment by PrimeTime 24 in 1991. It is curious that such "core" concerns have been unaddressed by the affiliates for so long.

Regrettably, "full cooperation" continues to be defined by our broadcaster friends as wholesale agreement to a signifcant rewriting of the 1988 Act. Anything less will apparently not resolve the "colossal nuisance" the affiliates appear to be experiencing as a part of the delivery of programming to people they cannot reach.

Although I cannot say with confidence that all of our differences will disappear as soon as the affiliates resume the discussions they terminated, PrimeTime 24 remains more than willing to discuss changes in procedures of both satellite carriers and broadcasters, at any time. We will cooperate fully in the future, as we have in the past. We will report to you on any progress we are able to make.

Very truly yours,



G. Todd Hardy

cc: Janet Foster
Hayden Gregory
Wade Hargrove, Esq.

millicom

August 1, 1991

Wade Hargrove, Esq.
Tharrington, Smith & Hargrove
209 Fayetteville Street Mall
P.O. Box 1151
Raleigh, North Carolina 27602

Dear Wade:

As promised, the following records my reactions to your letter of June 25 and the discussions which took place thereafter at CBS Network's Washington office on July 2.

As I explained at the outset in our July 2 meeting and in previous correspondence, we believe the attachment to your letter is in error with regard to both the facts and a proper interpretation of the spirit and letter of the Act. However we do agree that significant progress can be made in narrowing, and hopefully eliminating, the gap between us by abandoning arguments over who is to blame for our mutual frustration and by exploring reasonable changes in communications and procedures on both sides. It was in that spirit that I met with you in July and look forward to meeting with you again on August 7.

As was proposed last year when sampling of objections became warranted in our view, we resumed our eligibility confirmation processes for all network objections received for authorizations after April, 1990. That was done in the presumption that our earlier meetings would result in significant improvements and refinements in affiliate objections to new subscribing households. That 100% review is ongoing, however, the results appear to be the same. Very few customers are being deauthorized. Very large numbers of objections are still coming in. To date, we have not resumed sampling.

It seems clear that our previous dialouge has not improved the situation. The system is clogged with objections that do not, in the end, warrant deauthorization.

We understand completely that affiliates may feel frustrated when they send hundreds of objections and hear that none or a few of those result in deauthorizations without any household specific information as to the rest. We too would like to provide the networks with a report that lists deauthorizations as well as those

"in process" (the remainder being of confirmed eligibility by process of elimination) for reporting by the networks to the affiliates. Unless we make new and significant changes in procedures on both sides, we will not be able to reach that goal.

In order to accommodate each others concerns, we agreed that we should mutually explore the following items:

1. Creation and delivery of a current subscriber address list of all PT24 customers, sorted as agreed;

2. Agreement on: (a) a new method of forming and reporting affiliate objections that categorizes them by type, i.e. "commercial" and "signal strength", and that states acceptable reasons of each of the objections; and (b) procedures and materials that will be used by PT24 to respond to those objections, tailored to the type and basis for each; and

3. Agreement on the application, if any, of the procedures and materials referred to in 2 above to the list referred to in 1 above.

With regard to the current master subscriber list, it can be created within a reasonable time after we agree on the elements which should be used to organize the material, i.e. authorization date, zip code, state etc. We can discuss it further on August 7 and order the run thereafter.

The more difficult matter relates to the suggested adjustments in the affiliate objection procedures. It is apparent to us, particularly after changes in materials suggested by the networks and resumption of 100% confirmation procedures, that large numbers of objections are based only on the location of a customer within the Grade B Contour of a station, an inappropriate standard. It is also clear that the volume of paperwork and effort necessary as a result drowns objections based on other concerns such as receipt of the signal by bars or other "commercial" establishments. Our successful resolution of the majority of frustration depends entirely on the creation of a more informal and informative affiliate objection process.

If an affiliate clarifies its objection by noting its belief that a reported address is a bar or other commercial establishment and the reason for that belief, we could take different measures than those followed for private residences. When necessary, we can arrange to have a signal sent to all decoders which forces the boxes to identify themselves for later deauthorization, as I described in our last meeting. A "sting" could be scheduled to hit as many locales at once as possible in accordance with the level of the problem.

For "signal strength" objections, affiliates should describe their reasons for contradicting the recorded customer observations about signal quality. Peculiar circumstances such as neighbors known to general managers and beliefs that a household is within an area of "principal city service" could be handled with specialized materials and procedures. Grade A Contour objections could be handled separately given the lesser probability that it indicates ineligibility. Grade B Contour objections should be eliminated given the weight of contradictory evidence (purchase of equipment, purchase of subscription, and stated eligibility) compared to the significantly lower probability of coverage it represents by definition.

If affiliates followed these suggestions, real and urgent objections of greatest weight would not be buried in thousands of marginal objections, well-intentioned or otherwise. Total objections would be reduced to a number which would hopefully allow for 100% confirmation, reporting and updating by PT24.

Presuming success in discussions concerning the foregoing, we should then also be able to reach agreement on how those new affiliate objection procedures will be applied to the current master subscriber list to be created. Since we have already sent communications (sometimes more than one) to the households that the affiliates would presumably like to question anew, (the vast majority of whom responded with confirmations of eligibility) I suggest that only the most pressing concerns be made the subject of inquiry for all past subscriptions, i.e. "commercial" address and "principal city service" signal quality objections, under the procedures we ultimately agree upon for the future.

The following remaining matters discussed in our last meeting also require continued mutual review:

a. A list of distributors and dealers through whom PT24 sells its service will be provided on August 7th. Those who are able to independently authorize PT24 subscriptions will be listed as having tier bit access. Customers of the others are authorized by PT24 upon receipt of qualifying information by PT24. All listed are contractually bound to PT24 to follow its compliance procedures. Any changes to those procedures we agree to will be passed on to them. Their performance will be the subject of increased auditing by PT24 as we move into our next phases of procedure development.

b. We continue to disagree about the requirement for and content of notices in advertisements concerning eligibility under the Act. I understand that your affiliates view any notice other than the one you propose to be evidence of a less than adequate view of the Act. We, on the other hand, believe that no notice is required at all and that compliance is dictated by methods of authorization and reviews thereafter. More discussion is necessary.

c. Scripts used by PT24 and its distributors continue to be refined in deference to your concerns not because former versions were considered inadequate. The latest draft script contains changes relating to private viewing and separate treatment of signal quality issues in ways acceptable to PT24. A copy of the suggested revision is enclosed.

d. Location identification of each dish will continue for addresses which do not have either (i) a number and street or (ii) P.O. Box and Route Number. We will redouble our efforts in that area in the future but not expand them to include all "rural" addresses.

e. Site measurements may, in the future, be our only way to break impasses with respect to particular households objected to by affiliates after review under new procedures. We have not felt the need or obligation to conduct any measurements to date given the size of our customer base and the results of our audits. If you would like to discuss ground rules for such tests to be conducted by selected affiliates, we would be happy to do so. Before a measurement program is instituted, agreement on the qualification and objection procedures should probably first be given a chance to work in our estimate.

If I left something out, I apologize. Any omissions are not meant to be expressions of unwillingness to talk about any matters you wish to discuss. I look forward to our meeting next week.

Very truly yours,

G. Todd Hardy

If a customer wants to install any service:

Dealer Package orders: see page 61.
Other Dealer orders: see page 58.

1. Ask, *"Do you have a VideoCipher descrambler?"*

If **YES**, say
"Will the service you buy be used in your home or your business?"

If **NO**, say
"I'm sorry but we cannot install you without one."

If **HOME**, say
"Have you had a subscription to cable television in the last three months?"

If **BUSINESS**, say
"You will have to call our commercial sales representative, Jeff Jackson, and his phone number is 1-800-338-3165."

If **NO**, say
"Can you get an acceptable picture from any of the networks - ABC, CBS or NBC - with a conventional antenna?"

If **YES**, say
"I'm sorry, but we cannot authorize your subscription to PrimeTime 24."

If **YES**:
"Which channels can you get without your dish?"

You can install the customer for any network which he cannot get. Proceed to the next page.

If **NO**:
install all three networks. Proceed to the next page.

If he has never had a conventional antenna, ask

"Does a neighbor have a conventional antenna and can they get ABC, NBC and CBS?"

If **YES**, we can only install the networks they cannot get.

If **NO**, install all three networks.

millicom

August 19, 1991

Wade Hargrove, Esq.
Tharrington, Smith & Hargrove
209 Fayetteville Street Mall
P.O. Box 1151
Raleigh, North Carolina 27602

Dear Wade:

During our discussions on August 7th concerning affiliate objection procedures and responses, I neglected to deliver the list of current PrimeTime distributors. That list is enclosed with my apology for the delay.

As promised in our last meeting, this letter attempts to provide further details for the procedures which we will mutually implement in the future for all affiliate objections to the eligibility of new PrimeTime 24 subscribers:

1. Commercial Addresses
Changes in our script have been made recently to further protect against mistaken authorization of a commercial location. (Copies of that new script were supplied with my last correspondence.)

   a. If an affiliate believes that an address of a new subscriber is a commercial address, it should separately relay an objection to PT24 whenever discovered with a brief statement of the related reasons. Any evidence which supports that objection, ie copies of excerpts from yellow pages or business directories, should also be provided at that time to help the PT24 investigation that will follow.

   b. Within five (5) business days after receipt of each commercial address objection, PT24 will call that subscriber and ask him or her to confirm or rebut the affiliate supplied objection. Thereafter:

      (i) PT24 will request that a written showing of eligibility, e.g. proof of residence at the address, be forwarded to PT24 within ten business days accompanied by an appropriate verified statement;

(ii) PT24 will deauthorize the subscribing location for all three networks upon the earlier of: (1) the receipt of any information which confirms the objection or (2) the expiration of a twenty business day period following receipt of the objection if no information verifying eligibility is received by that time.

(iii) PT24 will submit a written report to the objecting affiliate, and each of the three networks, which details the results of its investigation within thirty business days of the receipt of the objection;

(iv) In the event an appropriate explanation and showing of eligibility is obtained by PT24 in the course of its investigation, PT24 will cooperate with the objecting affiliate in any further investigation desired by that affiliate either directly or through its dealer network.

c. Note: In the event affiliates object to the delivery of PT24 signals to commercial establishments which have not been authorized to receive PT24 transmissions, ie an illegal decoder location, PT24 will also cooperate with the appropriate network in an electronic decoder indentification effort at a time and in a manner that is mutually acceptable.

2. Signal Quality - Special Circumstances
We realize that from time to time an affiliate may have reasons, other than those discussed below, to object to the eligibility of a subscriber on the basis that his or her residence receives an adequate signal. We propose to treat those cases with different procedures once we are armed with the appropriate background facts.

a. In those cases in which an affiliate has peculiar knowledge of the signal quality at a given address of a newly reported subscriber, that affiliate should object separately to that address whenever discovered and briefly state the reasons why it believes that subscriber to be ineligible. Peculiar knowledge which will trigger the response outlined below should amount to personal observations of a representative of the affiliate that conclusively indicate that an adequate signal is available at the subject address, e.g. personal viewing of the picture quality at the subscribing household (or within a close proximity) or location of the subscribing household within sight of the affiliate transmitter, etc.

b. Upon receipt of the objection described in a. above, PT24 will follow the same procedures listed in 1b above except that: (1) the writing requested by PT24 will consist of

the standard verification postcard; (2) reports shall only be delivered to the affiliate and its network; and (3) deauthorization, if any, shall only be for the subject network signal.

3. Signal Quality - Principal City Service
If a subscriber address is located within the area of "Principal City Service" for an affiliate (definition to be agreed upon), the affiliate may object to that subscriber citing only that fact as the reason for the objection.

a. Affiliates shall submit objections based only of Principal City Service in a separate monthly report to PT24.

b. Within fifteen business days after receipt of each monthly list in this regard, PT24 will call each household on the list and notify the subscriber of the objection. If eligibility is not confirmed, service will be deauthorized immediately. If eligibility is confirmed in that conversation:

(i) The subscriber will be informed that service will be deauthorized if he or she fails to return a written verification of eligibility within ten business days;

(ii) PT24 will report on a monthly basis to each network the status of all objections and related investigations under this paragraph;

(iii) Deauthorizations will be automatically performed upon the passage of the "return time" allotted in the correspondence to the subscriber;

(iv) Copies of all written verifications of eligibility will be supplied to each network along with the monthly report mentioned above.

4. Signal Quality - Grade A Contour
If a subscriber address is located within the predicted Grade A Contour of an affiliate signal, the affiliate may object to that subscription citing only that fact as the reason for the objection.

a. Affiliates shall submit objections based only on Grade A Contour locations in a separate monthly report to PT24.

b. The same procedures discussed in 3b above will be followed by PT24 except that PT24 will not deauthorize households which have not been found to be ineligible until followup efforts (reminder letters or subsequent telephone calls) have failed to produce the requested written verification of eligibility. Deauthorization on

either a temporary (if written verification is ultimately and belatedly received) or permanent basis will automatically occur within forty-five business days of the first call to the subject household if written verification has not been delivered to PT24 prior to that cutoff date.

5. Signal Quality - Grade B Contour
Affiliates may only object to eligibility of subscribers located in the predicted Grade B Contour of an affiliate signal if that affiliate has conducted a site measurement of the signal strength at that household, in accordance with applicable FCC regulations.

a. Any affiliate objection based on a site measurement discussed above must be made in a separate monthly report to PT24 which states the date a measurement has been taken, the method and equipment used and the results of that measurement.

b. PT24 will follow the same procedures in response to objections based on Grade B/site measurements as it follows for Grade A objections.

6. Objection Procedures
Any affiliate objection which does not comport to the following will not be the subject of PT24 review or verification unless:

(i) It is delivered within six months of the date of first authorization of the subscriber;

(ii) It is the subject of a "verified" written objection which has been executed by the affiliate representative most knowledgeable about the background facts (we look to you for draft affidavit type language); and

(iii) the affiliate has consistently followed the parameters and procedures for objections mentioned above.

Obviously, we would like your input and comment on all of the foregoing before any of these revised procedures are implemented. We have not had time to create drafts of new materials necessary for such implementation. We will do so upon agreement with the concepts outlined in this letter.

All of the foregoing is suggested in the hope and presumption that considerably fewer objections will result. If the volume of objections is unchanged, we will not have solved anything and the foregoing detail and response time will be impossible.

As we also discussed, the current master list of PT24 subscribers will not be delivered until our computer specialists get together. We realize that you will need to be able to organize

and separate the information readily. We are holding off on producing any hard copies of the list as a result. Roy Levy of our office awaits further word from Ellen Agress on the subject.

The delivery of that list will also necessarily follow agreement on the manner in which new verification procedures, as ultimately agreed to, are to be applied to that list. We explained last time that we felt no need to simply repeat past efforts for all "objectionable" addresses. After further thought, we propose that affiliates forward objections, under our new regime, to the extent they are based on reasons outlined in paragraphs 1, 2 or 3 above. We will follow the procedures listed in 1, 2 and 3 above as appropriate. If a subscriber has already provided written evidence of eligibility, that writing will be produced in the reports to the network.

To the extent affiliates believe that an address on the master list we will create is ineligible because it is located within either the Grade A or Grade B Contour, we are willing to follow the procedures indicated in paragraphs 4 and 5 above so long as site measurements are taken for each address regardless of the contour involved.

These proposed retrospective applications also depend on presumed reduced number of objections to a managable level. If renewed objections are on the same level as the past, we will not be able to make these accomodations.

In further deference to your concerns about our script, we offer the attached revisions. I believe these modifications follow your input from our last meeting. No implementation of these changes will be made until I hear that they are acceptable to all of the networks.

Finally, we again discussed the supply of customer names in addition to addresses on a monthly basis. As you know, we feel very strongly that privacy and proprietary issues far outweigh any benefit to selected rural affiliates who may recognize a few of the subscribers more readily than they recognize an address location. Although some "drop dead" remedies may be able to be fashioned contractually in the event any affiliate contacts a customer, we can think of little acceptable recourse for misdelivery of our list to our competitor. That fear is particularly true as we move closer to delivering a master list to each network.

We appreciate the spirit in which our discussions have been conducted. We remain confident that continued talks will result in workable and reasonable ground rules for the future.

Very truly yours,

G. Todd Hardy

APPENDIX 2.—LETTER FROM PAULA A. JAMESON, SENIOR VICE PRESIDENT, GENERAL COUNSEL AND SECRETARY, PUBLIC BROADCASTING SERVICE (WITH ATTACHMENT), TO HON. WILLIAM J. HUGHES, CHAIRMAN, APRIL 13, 1993

PBS

APR 1 3 1993

April 13, 1993

RECEIVED

APR 21 1993

Sub on Courts

The Honorable William J. Hughes
Chairman
House Subcommittee on Intellectual Property
and Judicial Administration
207 Cannon Office Building
Washington, D.C. 20510

Dear Mr. Hughes:

The Public Broadcasting Service (PBS) is supportive of legislation that extends, on a permanent basis, the Copyright Act's Section 119 satellite carrier compulsory license. Your bill to reauthorize the Satellite Home Viewer Act, H.R.1103 is consistent with PBS's long standing commitment to ensuring universal access to its programming services, generally, and to people in rural areas who lack access to public television programming via over-the-air signals, in particular. In furtherance of this goal, PBS submits this letter requesting clarification in the legislation of the status of public broadcasting stations, which we believe should have the same protections afforded to them as "network stations" for purposes of satellite retransmission.

As you know, the Satellite Home Viewers Act of 1988 makes a distinction between the retransmission of superstation and network primary transmissions. The Act permits satellite operators to retransmit "superstation" signals throughout the country pursuant to the Section 119 compulsory license, provided the retransmission does not duplicate that station's available over-the-air signal. However, the act restricts a satellite carrier's license to retransmit network programming to unserved households (so-called "white areas").

The legislative history suggests that Congress limited the scope of the compulsory license for network programming in order to properly balance the interests of copyright owners and satellite dish owners by ensuring that local television stations would not be adversely affected by satellite retransmissions. See H. Rept. No. 887, 100th Cong., 2nd Sess., pt.1, at 15 (1988).

The Act reflects Congress' recognition that satellite retransmission could unfairly duplicate over-the-air signals. Thus, compulsory license rights are available only in "white areas" where the network signal is not available and, therefore, can not be duplicated.

Unfortunately, the current law does not address the status of public television signals. The term "network," as used in the statute, does not explicitly include public television. This has allowed certain satellite operators to treat a public television station as "superstation" under the compulsory license. We believe this is inconsistent with the intent underlying Section 119 and contrary to the objective of promoting and preserving local stations.

PBS believes that the satellite compulsory license for retransmission of its programming should be limited, as are the commercial networks, to broadcast into "white areas." Allowing satellite retransmission into areas already served by an over-the-air public television signal raises precisely the concern that led to enactment of Section 119: it compromises the effectiveness of local public television stations by permitting duplicative signals from other areas to be retransmitted into the area served by the local station. This is of particular concern to public television stations, which are focused on local communities and draw important fund-raising and other support from the local viewership. Duplicative signals, in short, dilute the effectiveness of the local television station -- the precise result that we believe Section 119 was intended to avoid.

The legislative history clearly states that Congress intended that public television signals would be treated like network signals for purposes of the satellite compulsory license. The House report reads:

> "The bill contains special provisions in section 119(a)(2) and (5) relating to network stations in recognition of the fact that a small percentage of television households cannot now receive clear signals of the three national television networks. The bill confines the license to the so-called "white areas," that is, households not capable of receiving the signal of a particular network by conventional rooftop antennas, and which have not subscribed, within the 90 days preceding the date on which they subscribe to the satellite carrier's service, to a cable system that provides the signal of a primary network station affiliated with that network.

> Utilizing the existing definition in Section 111(f), the new statutory license for retransmission of network stations applies, at the present time, exclusively to those stations owned by or affiliated with the three major commercial networks (ABC, CBS, and NBC) and the stations associated with the Public Broadcasting Service (emphasis added).

See H. Rept. No. 887, 100th Cong., 2d Sess., pt. 2 at 19 (1988).

The clarification we propose is consistent with the position of the Copyright Royalty Tribunal (CRT). Based on its reading of the statute and legislative history in a recent proceeding to distribute satellite carrier royalties, the Copyright Royalty Tribunal assumed that network stations and public television stations should be treated in the same manner for purposes of the satellite compulsory license. The CRT found that satellite carriers:

> "paid $.12 per subscriber per month for superstations and $.03 per subscriber per month for network affiliates and public television stations. These two categories . . . permit accurate evaluation of the royalty fees paid by satellite carriers for carriage of the stations within each category."

See CRT Decision and Order issued in the matter of the 1989-1991 Satellite Carrier Royalty Distributing Proceedings (December 4, 1992).

As you proceed with formal consideration of H.R. 1103, we urge you to modify the bill in a way that clarifies the status of public television for purposes of the satellite compulsory license. Draft language is attached for your consideration. The language is intended to make clear that a public television station is to be treated like a "Network Station" for purposes of the satellite compulsory license. This will prevent satellite retransmission from diluting the vitality of our local stations across the country.

Thank you for your consideration of this matter. We will be happy to work with members of your staff as H.R. 1103 moves through the legislative process.

Cordially,

Paula A. Jameson
Senior Vice President,
General Counsel & Secretary

cc: Representative Carlos J. Moorhead
William F. Patry, Counsel
Thomas E. Mooney, Counsel
David J. Brugger, America's Public Television Stations

Amendment to Satellite
Compulsory Licensing System
To Clarify Status of
Public Television Stations

Section 119 of Title 17, United States Code is amended as follows:

- Subsection (a) is amended by inserting the following new paragraph:

  "(8) Noncommercial educational stations. For purposes of this section, a satellite carrier shall have the same rights of retransmission for noncommercial educational stations as network stations and shall pay the same compulsory license fees for noncommercial educational stations as are paid for network stations."

- Subsection (d) is amended by inserting the following new paragraph:

  "(11) Noncommercial educational station. - The term "noncommercial educational station" has the meaning given that term in section 111(f) of this title.

APPENDIX 3.—LETTER FROM DAVID D. ALWORTH, EXECUTIVE DIRECTOR, BROADCASTING, OFFICE OF THE COMMISSIONER, MAJOR LEAGUE BASEBALL, TO HON. WILLIAM J. HUGHES, CHAIRMAN, APRIL 27, 1993

April 27, 1993

The Honorable William Hughes
U. S. House of Representatives
241 Cannon House Office Bldg.
Washington, D.C. 20515

Dear Congressman Hughes:

I am writing with respect to HR 1103, which was introduced by you and Congressman Moorhead.

Section 101 of HR 1103 is intended to remove the sunset provision in Section 119 of the Copyright Act, which currently affords satellite carriers a compulsory license to retransmit "superstations" and network stations to home satellite dish owners. The Section 119 compulsory license is scheduled to expire on December 31, 1994. Section 101 of HR 1103 also codifies the royalty rates adopted by an Arbitration Panel, and approved by the Copyright Royalty Tribunal, last year.

The purpose of Section 201 of HR 1103 is to extend the cable television compulsory license in Section 111 of the Copyright Act to "wireless cable systems" and other communications media. Section 201 of HR 1103 also makes certain changes that will reduce the royalty obligations of media eligible for the Section 111 compulsory license.

I regret that Major League Baseball is unable to support HR 1103.

As you know, Mr. Chairman, Major League Baseball historically has been opposed to compulsory licensing of superstations, which broadcast a substantial number of baseball games each season. In 1988 we agreed not to object to the enactment of Section 119 on the understanding that the satellite carrier compulsory license would sunset at the end of 1994, and that a permanent legislative solution to the compulsory licensing issues would be found before that date.

In your introductory remarks, Mr. Chairman, you noted that "omnibus" compulsory licensing legislation will be introduced shortly. We strongly support your efforts to revisit, in a comprehensive fashion, the compulsory licensing provisions embodied in Sections 111 and 119 of the Copyright Act. We do not believe that changes in this important area of copyright law should be made in a piecemeal fashion. The issues raised by HR 1103 are intimately related to the issues underlying comprehensive reform of compulsory licensing. We therefore urge that you consider all of these issues together in your forthcoming omnibus bill.

We also are concerned that HR 1103 will permit cable operators, satellite carriers and others to sell baseball and other telecasts on broadcast signals without paying fair marketplace compensation.

The royalty rates in Section 111 of the Copyright Act of 1976 were set at an exceedingly low and arbitrary level in order to stimulate growth of the then-embryonic cable industry. Indeed, under the Section 111 rates, the cable industry pays less than one percent of its total revenues in compulsory licensing royalties. There is no justification for requiring baseball and other copyright owners to continue providing such enormous subsidies to those corporate giants that now dominate the cable industry.

HR 1103, however, not only fails to mandate the payment of marketplace rates as a condition to the carriage of baseball telecasts on superstations and other broadcast signals. The bill also contains provisions which will reduce significantly the royalties now paid by cable systems.

We have already discussed with your staff our concerns regarding (1) Section 201(a) of HR 1103 (insofar as it eliminates language in Section 111 of the Copyright Act that currently prevents large cable systems from taking advantage of the royalty rates intended for small systems) and (2) Section 201(b) (insofar as it appears to abolish the 3.75 marketplace rate that cable systems now pay to carry distant signals not authorized by the FCC's rules in effect on June 24, 1981). Our understanding is that these concerns will be addressed in forthcoming amendments to HR 1103. Such amendments should increase, rather than lessen, the Section 111 royalty obligations to ensure that cable systems begin paying fair compensation for the carriage of superstation baseball telecasts.

We also are concerned that Section 101 of HR 1103 fails to require satellite carriers to pay marketplace rates. Superstations and network stations are being sold to home satellite dish owners at a price of approximately $1 per subscriber per month. Section 101, however, would permit copyright owners to receive a total of only 6 to 17 cents of this dollar. Furthermore, under HR 1103 no adjustment in the Section 119 royalty rates would take effect until 1996 -- a period which satellite carriers unjustifiably want extended to 1998.

We recognize that the rates in Section 101 are the same as those adopted in the Section 119 rate proceedings conducted last year. But the Section 119 rates are not marketplace rates. Indeed, they were established pursuant to criteria in Section 119 that tie the satellite carrier rates to the minimal amounts that cable systems pay under Section 111. The Section 119 criteria (which are unchanged by HR 1103) were adopted on the understanding that satellite carriers would begin paying fully-negotiated marketplace rates once Section 119 expired in 1994. Likewise, the Arbitration Panel adopted its rates with the understanding that they would be in effect only through 1994.

As you may know, Mr. Chairman, Major League Baseball is at a critical juncture in its relationship with national broadcast and cable networks, whose baseball contracts expire at the end of this season. Because of depressed ratings and heightened competition for limited national advertising, the networks have become increasingly less interested in presenting national telecasts of baseball games to the American public.

This is a matter of great concern to Major League Baseball, and particularly to the less profitable clubs from smaller markets. National telecasting revenues are the single largest source of shared revenue in baseball and are essential to the financial viability of these clubs. The networks' decreased interest in baseball is also a matter of concern to baseball fans nationwide, who have come to expect the diversity and quality of baseball programming that currently exist on national television.

The national networks' declining interest in televising baseball is in large part attributable to the growth and proliferation of superstations. These stations effectively acquire national rights to broadcast baseball without paying national compensation; and they unfairly compete with the national networks (which have paid such compensation) for the

limited amount of national advertising. If enacted into law, HR 1103 would exacerbate, rather that alleviate, these problems by extending and perpetuating compulsory licensing of superstations and by continuing to deprive baseball of fair marketplace compensation for the carriage of its telecasts.

For the above reasons, Mr. Chairman, Major League Baseball cannot support HR 1103. We greatly appreciate your hard work in this area. We look forward to cooperating with you in the formulation of omnibus compulsory licensing legislation that is fair and equitable to all parties.

Sincerely,

David D. Alworth
Executive Director, Broadcasting

DDA:eb

cc: Allan H. Selig
Jerry Reinsdorf
Thomas J. Ostertag
Eugene Callahan

APPENDIX 4.—STATEMENT OF POSITION OF THE NETWORK AFFILIATED STATIONS ALLIANCE ON H.R. 1103 (WITH ATTACHMENTS), UNDATED

The Network Affiliated Stations Alliance ("NASA") is a coalition of the ABC, CBS and NBC Television Affiliate Associations and consists of over 650 local television stations that are affiliated with one of the three major broadcast networks. NASA, along with the ABC, CBS and NBC Networks, the National Association of Broadcasters and the Motion Picture Association of America, supports H.R. 1103 and urges its approval by the House Judiciary Committee.

We urge members of the Judiciary Committee to oppose any attempt that may be made at the Committee mark-up to weaken H.R. 1103. We believe, however, that the penalties for violation of the Home Satellite Viewer Act should be increased, and if an amendment to H.R. 1103 should be offered in mark-up for that purpose, we urge members of the Committee to support it.

BACKGROUND

The Home Satellite Viewer Act (the "Act") was adopted by Congress in 1988, inter alia, to allow satellite carriers to deliver broadcast network programming on a paid subscription basis for private home viewing to home dish owners who, because of distance or terrain obstructions, are unable to receive the network from a local station affiliate. These service restrictions were placed in the Act (with the support at the time of the

satellite industry) to preserve the longstanding network/local affiliate distribution system--a system which permits national network programming to be paired with local news, information and public interest programming and delivered free, over-the-air by local television stations.

Evidence was revealed at the Subcommittee's hearing on H.R. 1103 that hardly had the ink dried on the 1988 Act before satellite carriers began to violate the Act on a massive scale by refusing to confine their delivery of network programming to homes that could not receive network programming from a local affiliate. Numerous examples were furnished to the Subcommittee of satellite delivery of network programming to bars, restaurants and commercial establishments and to homes that can receive the same network service free from a local network station.

Concerned that if permitted to go unchecked continued violation of the Act would undermine and eventually destroy the nation's free, network/local affiliate distribution system, the Subcommittee incorporated into H.R. 1103 two clarifying provisions. These provisions were intended by the Subcommittee to ensure compliance by satellite carriers with the Act's so-called "white area" service restrictions.

The first of these provisions clarifies, as a purely procedural matter, who has the burden of proof in disputes concerning the eligibility of a home to receive satellite delivery; the other requires satellite carriers to disclose the names of their subscribers which, it is hoped, will encourage compliance with the Act.

BURDEN OF PROOF

H.R. 1103 clarifies for procedural purposes who has the burden of proof where disputes arise concerning whether a home can adequately receive a local network signal. We believe the Act in its present form places the burden of proof on satellite carriers for all homes wherever they may be located. The satellite carriers, however, disagree. To clarify any ambiguity and in a spirit of compromise, H.R. 1103 provides that if the home is located within a local affiliate's primary service area (i.e., within its predicted Grade B service contour as defined by the FCC) the burden of proof that the home does not receive that affiliate's signal is placed on the satellite carrier.

This, of course, is appropriate because the FCC's engineering rules "presume" that areas within a station's predicted Grade B service contour receive an adequate technical signal. It is on the basis of "predicted" Grade B service contours that the FCC's entire television channel allocation scheme is premised. Under H.R. 1103 (just as in proceedings before the FCC) the "presumption" of adequate service within a "predicted" Grade B contour may be rebutted by a satellite carrier by an actual site measurement of the signal intensity.

In short, H.R. 1103 simply clarifies a procedural issue that many had thought to be clear from the original Act. Moreover, it is only fair that the party who stands to profit from paid satellite service subscriptions should have the burden of proof--not the party who stands to be harmed by the satellite carrier's potential copyright infringement.

THE NAMES OF SUBSCRIBERS

H.R. 1103 amends the Act to require satellite carriers to provide the "names" of their subscribers to local stations along with their addresses. Oddly enough, the Subcommittee Report[1] that accompanied the original Act expressly stated that the "names" of subscribers must be provided, but the Act, itself, did not. Apparently, the Subcommittee was under the impression in 1988 that the language in the Act required this, when, in fact, it did not.

One of the satellite carriers (Netlink) has furnished the names of its subscribers and has never objected to doing so; the other (PrimeTime 24), despite repeated requests from local stations, has steadfastly refused.

The Act expressly states, incidentally, that subscriber information may only be used for monitoring compliance to protect the privacy of subscribers. There has been no complaint of privacy problems as the result of Netlink's having furnished the names of its subscribers to local stations over the years.

PENALTIES FOR VIOLATION OF THE ACT

The existing penalties for violation of the Act are inadequate and create little, if any, incentive for satellite carriers to comply with the Act's service restrictions. The penalties placed in the Act five years ago might have then been appropriate because the satellite

---

[1]House Committee on the Judiciary, Rept. No. 100-887, Part I, 100th Cong. 2nd Sess., on H.R. 2848 at 18.

carriers were just getting started. Today, however, these carriers are up and running, and have since been bought out by large corporations that need no special government hand out. There are two satellite carriers that presently deliver broadcast network programming: Netlink, which is owned by TCI (the world's largest cable television company) and PrimeTime 24, which is owned by Millicom (an international British-owned telephone conglomerate).

The penalty provisions of the Act [17 USC §119(a)(5)] distinguish between an "individual" violation and a "pattern" of violation. These provisions are set out in Attachment A.

A. Individual Violation

In the case of an individual violation, no damages may be awarded if the satellite carrier promptly withdraws the service. If the satellite carrier refuses, a court may award statutory damages not to exceed $5 per month. Presumably, only if a carrier refuses to obey a court ordered determination that service is being provided unlawfully may statutory damages, not to exceed $5 per month, be awarded. Clearly, this creates little, if any, incentive for satellite carriers to comply with the Act's service restrictions.

Recommendation: H.R. 1103 should be amended to (1) clarify that statutory damages for an individual act of infringement may be imposed from the date unlawful service began--

rather than when a judicial determination of unlawfulness is made and (2) statutory damages for an individual act of infringement should be increased to an amount not in excess of $200 per month for each month during which the violation occurred.

B. Pattern Of Violation

If it is established that a "pattern" of violation has been carried out by a satellite carrier on either a nationwide, regional or local basis, a court may award substantial statutory damages. The problem, however, is that the legislative history of the Act defined the term "pattern" in a way that makes it virtually impossible to make the requisite showing.

The House Judiciary Committee Report[2] accompanying the Act defined the term "pattern". The Report states that in order to establish a "pattern" of violation it must be shown that at least 20 percent of a carrier's subscribers in the entire nation (in the case of a national showing) or 20 percent in the ADI (in the case of a local or regional showing)

[2]House Committee on the Judiciary, Rept. No. 100-887, supra at 18.

is receiving the service illegally.[3] [The relevant portion of the Report is contained in Attachment B.]

A 20 percent threshold is excessive for it permits carriers to serve some 20 percent of the nation unlawfully with impunity. A tolerance for copyright infringement of that magnitude is unprecedented in the law. A 5 percent threshold would be more reasonable.

Moreover, the "ADI" is hardly the appropriate geographical area for defining a "regional" or "local" area. A station's predicted Grade B contour--not the "ADI" in which the station is located--is a more accurate measure of a station's actual service area. All stations within an ADI do not transmit on the same channel, nor with the same power, nor with the same antenna height, nor from the same tower site. Each of these factors determines the geographical area actually served by a station. An ABC affiliate, for instance, may serve one part of a local ADI, the CBS affiliate another and the NBC affiliate still another. Thus, an affiliate's Grade B contour--not the ADI in which it is located--is the more appropriate geographical standard for defining a "local" or "regional" pattern of violation.

Recommendation: H.R. 1103 should be amended to (1) lower the 20 percent threshold to 5 percent and (2) define the "local"

---

[3]"ADI" stands for the Area Of Dominant Influence and is a term used by one of the national ratings services (Arbitron) to establish a local market area for all the stations in a given market.

and "regional" area as the area encompassed by a station's predicted Grade B contour.

These changes would be fair, and would, in our view, create an appropriate incentive for satellite carriers to comply with the Act's "white area" service restrictions.

September 13, 1993

* * *

For additional information contact:

Wade H. Hargrove
Tharrington, Smith & Hargrove
Post Office Box 1151
Raleigh, N.C. 27602
Telephone: (919) 834-9216

or
Gregory M. Schmidt
Covington & Burling
Post Office Box 7566
Washington, D.C. 20044
Telephone: (202) 662-5160

or
Werner K. Hartenberger
Dow, Lohnes & Albertson
1255 23rd Street, Suite 500
Washington, D.C. 20037
Telephone: (202) 857-2630

Counsel for the
Network Affiliated Stations Alliance

[chsva3/ba]

ATTACHMENT A

Penalties For Violation

"(5) VIOLATION OF TERRITORIAL RESTRICTIONS ON STATUTORY LICENSE FOR NETWORK STATIONS.—

"(A) INDIVIDUAL VIOLATIONS.—The willful or repeated secondary transmission by a satellite carrier of a primary transmission made by a network station and embodying a performance or display of a work to a subscriber who does not reside in an unserved household is actionable as an act of infringement under section 501 and is fully subject to the remedies provided by sections 502 through 506 and 509, except that—

"(i) no damages shall be awarded for such act of infringement if the satellite carrier took corrective action by promptly withdrawing service from the ineligible subscriber, and

"(ii) any statutory damages shall not exceed $5 for such subscriber for each month during which the violation occurred.

"(B) PATTERN OF VIOLATIONS.—If a satellite carrier engages in a willful or repeated pattern or practice of delivering a primary transmission made by a network station and embodying a performance or display of a work to subscribers who do not reside in unserved households, then in addition to the remedies set forth in subparagraph (A)—

"(i) if the pattern or practice has been carried out on a substantially nationwide basis, the court shall order a permanent injunction barring the secondary transmission by the satellite carrier, for private home viewing, of the primary transmissions of any primary network station affiliated with the same network, and the court may order statutory damages of not to exceed $250,000 for each 6-month period during which the pattern or practice was carried out; and

"(ii) if the pattern or practice has been carried out on a local or regional basis, the court shall order a permanent injunction barring the secondary transmission, for private home viewing in that locality or region, by the satellite carrier of the primary transmissions of any primary network station affiliated with the same network, and the court may order statutory damages of not to exceed $250,000 for each 6-month period during which the pattern or practice was carried out.

"(C) PREVIOUS SUBSCRIBERS EXCLUDED.—Subparagraphs (A) and (B) do not apply to secondary transmissions by a satellite carrier to persons who subscribed to receive such secondary transmissions from the satellite carrier or a distributor before July 4, 1988.

ATTACHMENT B

Definition Of A
Pattern Of Violation

Page 18

If the satellite carrier engages in a willful or repeated pattern or practice of violations, the court shall issue a permanent injunction barring the secondary transmission by the satellite carrier of the primary transmission of any network station affiliated with the same network. The injunction would be applicable within the geographical area within which the violation took place—whether local, regional, or national. The Committee intends that no pattern or practice of violations be found for a local or regional area that is smaller than a local network station's market, as defined by the Area of Dominant Influence ("ADI"), Designated Market Area ("DMA"), or comparable areas defined by rating services. Under Rule 65(d) of the Federal Rules of Civil Procedure, an injunction against a carrier would run not only against the specific entity named in the lawsuit, but also against the officers, agents, servants, and employees of that entity, and those in active concert or participation with them who receive actual notice of the injunction.

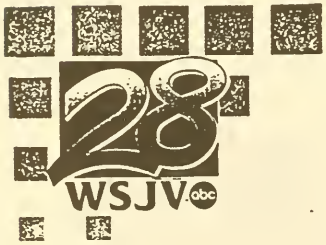
The statutory damages maximum for a pattern and practice of violations is $250,000 per network for each 6-month period. No liability will attach to violations relating to persons who subscribed before July 4, 1988, whether on an individual basis or with respect to any alleged pattern or practice.

* * *

Page 19

In view of the possibilities for error which would occur despite reasonably diligent efforts to avoid them (because of variables such as customer self-reporting and engineering tests of signal adequacy), it is the intent of this statute that no pattern or practice be found if, excluding subscribers grandfathered under section 119(a)(5)(C), less than 20% of the subscribers to a particular network station (on either local, regional, or national bases) are found ineligible. The Committee stresses at the same time that the 20% allowance is not intended to relieve the carrier from the obligation of reasonable diligence to comply with the "unserved household" criteria of this statute to all households served.

APPENDIX 5.—EXAMPLES OF ABUSE OF THE HOME SATELLITE VIEWER ACT BY SATELLITE CARRIERS (14 LETTERS TO WADE HARGROVE, ESQ., THARRINGTON, SMITH & HARGROVE)



September 1. 1993

Wade H. Hargrove, Esquire
Tharrington, Smith and Hargrove
P.O. Box 1151
Raleigh, NC 27602

RE: Home Satellite Viewing Act

Dear Wade,

I regret the delay in responding to your inquiry, but I am certain you understand that ABC affiliate General Managers are most involved in both the "NYPD Blue" matter and final discussions with cable companies.

Attached you will find my marked list of recent connections for both Netlink and Primetime 24 (August 1993) for the South Bend/Elkhart, Indiana television market. Please note the attached lists include connections, disconnects and unknown market designations.

Originally, I had intended to note with pins on our coverage map the connections, but there are so many that the map would not hold all the pins. I have attached a map that clearly indicates the cities', Grade A and Grade B coverage limits. Listed below you will find that a total of 416 connections have been made by Netlink and 75 connections have been made by Primetime 24, just in the month of August, in this market's Grade A area. It is further proper to note that the Grade A coverage area is similar for both WSBT-TV and WNDU-TV, but we do have more power at five million watts.

Netlink

Connections in Grade A	416
Connections in Grade B	58
Unknown subscribers	100
Disconnects	157

Primetime 24

Connections in Grade A	75
Connections in Grade B	10
Unknown subscribers	32
Disconnects	45

With a total of 491 connections within our Grade A coverage area in the month of August 1993, this is a very serious problem that must be resolved promptly.

Just two weeks ago, my wife and I had lunch in a prominent Elkhart restaurant and they were airing a distant network signal via satellite. This business establishment is in the center of Elkhart with an off-air antenna, but they are clearly in violation of the law. This type of illegal viewing is everywhere, because the law has no enforcement or support.

A separate report will be directed to both Netlink and Primetime 24, the usual practice when the ABC reports are received. Copies of my report will be directed to both Bill Duhamel and yourself.

Sincerely,

F. Robert Kalthoff
Vice President and
General Manager

FRK/lc

Attachments

cc: Bill Duhamel, KOTA-TV
Tom Oakley
Ralph Oakley

Fisher Broadcasting Inc.
KOMO Radio and Television, KATU Television, ABC Affiliates.

August 20, 1993

Mr. Wade Hargrove
Tharrington, Smith and Hargrove
209 Fayetteville Street Mall
Raleigh, NC 27602

Dear Wade:

Your request to develop a contour map showing the sites of homes within KOMO-TV's Grade B contour that subscribe to satellite carriers may not be the best way to illustrate the situation in our area.

To explain why, the August 1993 lists from Netlink and PrimeTime 24 include 954 subscribers within the Grade B contour (see attachment A), 77 homes in Seattle alone. If we were to pinpoint the 954 homes the map would literally be one large black dot.

I have been responsible for monitoring this issue for Fisher Broadcasting Inc. since the Home Satellite Viewing Act went into effect. Since that time we have averaged 100 to 150 homes contested with each list. I have never received a phone call from Netlink or Primetime 24 questioning any of the homes contested, moreover, I have never received a phone call from an angry subscriber complaining about not being able to receive the satellite carrier.

The 954 homes contested by KOMO-TV in this most recent mailing is higher than in any previous mailing. Possible explanations include the fact that in this mailing each carrier had two lists instead of the usual one and this is only the second mailing this year. Another explanation is that business is good in the satellite industry!

Whatever the reason, Don Wilkinson, VP/Director of Engineering, has double-checked to verify all homes contested are indeed within our Grade B contour.

Compounding the problem, it has come to my attention that the local satellite dealers are becoming adept at circumventing the Act by recommending to customers that they use an address <u>outside</u> the Grade B contour for billing purposes. This would make investigating illegal hookups an extremely difficult, if not impossible, task.

Two other points I wish to make here pertain to the lists I recently received. First, in looking over the "Disconnects - August 1993" lists and the "Connects - August 1993" lists several names appear on both lists. Secondly, for some homes the names were changed. For instance the "Disconnects - August 1993" list includes a Rutyh Adams, 20116 6th St. NE, Snohomish, WA and the "Connects - August, 1993" lists includes Don Elkins, 20116 6th St. NE, Snohomish WA. It appears that in some instances, homes are being disconnected then reconnected under another name. (see attachment B)

I feel this issue is important and it seems obvious to me that the satellite carriers are trying every trick in the book to try to confuse an already confusing situation.

I hope this information is useful and if I can be of any future assistance please let me know.

Sincerely,

Leslie Soule

Leslie Soule
Director of Program Standards/Cable Relations

A POST-NEXSTAR STATION

[Letter From
WPLG(TV)
Miami, Florida]

August 20, 1993

Mr. Gregory M. Schmidt
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20004

Dear Greg:

At your request, I reviewed the computer printouts provided to John Garwood from ABC dated August 16, 1993.

To keep the review organized, I arbitrarily assigned section numbers as follows:

Netlink Connects as of August 1993

Section 1 Pages 652-665
Section 2 Pages 834-835
Section 3 Pages 1122-1137

Netlinks Disconnects as of August 1993

Section 4 Pages 512-516
Section 5 Pages 607-611

Primetime 24 Connects as of August 1993

Section 6 Pages 503-509
Section 7 Pages 828-846

I then reviewed each address to determine their location and classified them three ways:

1. Within WPLG Grade B
2. Outside WPLG Grade B
3. Could not determine.

To simplify the results, I assumed all customers whose location I could not determine, outside the grade. Giving the benefit of the doubt to the satellite companies.

Since, as I mentioned on the phone, the coverage area in the Miami market is fairly straightforward due to the Atlantic ocean, the Everglades and the flat terrain this was not quite as difficult an assignment as it may be in other markets.

Here are the results by section:

Netlink:

Section #1

Total Connects	581
Total Connects Inside Grade B	566

Section #2

Total Connects	70
Total Connects Inside Grade B	9

Section #3

Total Connects	647
Total Connects Inside Grade B	573

Netlink Total Connects	1298
Total within Grade B	1148
Total Inside Grade B	88%

Netlink Disconnects:

Section #4

Total Disconnects	182
Total Inside Grade B	147

Section #5

Total Disconnects	175
Total Inside Grade B	128

Netlink Total Disconnects	357
Total within Grade B	275
Total Inside Grade B	77%

Primetime 24 Connects:

Section #6

Total Connects	239
Total Inside Grade B	206

Section #7

Total Connects	775
Total Inside Grade B	676

Primetime 24 Totals:

Total Connects	1014
Total Inside Grade B	882
Total Inside Grade B	87%

You mentioned you were looking for at least 50 customers within the Grade B, clearly these figures show the problem is a lot worse than you initially suggested.

If I can be of further help let me know.

Sincerely,

Stephen P. Flanagan
VP/ of Engineering
Post-Newsweek Stations, Inc.

SPF/cfg

P.S. - I did not include the actual computer printouts I reviewed, as my small contribution to the paperwork reduction act. If you need them in the future just call.

JDO
Jermain Dunnagan & Owens, P.C.
LAW OFFICES

WILLIAM K. JERMAIN
CHARLES A. DUNNAGAN
BRADLEY D. OWENS
RANDALL D. SIMPSON

HOWARD S. TRICKEY
GREGORY C. TAYLOR
GARY C. SLEEPER

GEORGE T. FREEMA
JAMES A. GASPER
W. MICHAEL STEPHE
PENNY J. DUFEK

3000 A STREET, SUITE 300
ANCHORAGE, ALASKA 99503

TELEPHONE (907) 563-8844
FAX (907) 563-7322

VIA FAX NO. (919) 829-1583

September 7, 1993

Wade Hargrove, Esq.
Pharrington, Smith & Hargrove
P O Box 1151
Raleigh, NC 27602

RE: NET LINK

Dear Mr. Hargrove:

As we discussed during our telephone conversation on Tuesday, September 7, 1993, I am an attorney in Anchorage, Alaska who represents a Receiver appointed by the U.S. District Court to maintain and operate certain television broadcast properties in Anchorage, Fairbanks and Juneau, Alaska. These television broadcast properties are KIMO, KATN and KJUD, respectively, each of which is an affiliate of the American Broadcasting Company, Inc. The receivership was established over these properties on January 15, 1993 and the receiver has been endeavoring since that time to ensure the efficient operation of these television stations in an effort to minimize expenses and losses, while at the same time maximize income and revenues.

As you may not be aware, the Monday Night NFL Football Game is telecast over the ABC affiliates in Alaska on a two-hour delayed basis. In Alaska, the live broadcast of the Monday Night NFL Football Game begins at 5:00 p.m., but is not broadcast on the ABC affiliate stations here in Alaska until 7:00 p.m. in order to air advertising spots for local advertisers, as well as to accommodate program scheduling. However, it has come to our attention that there are a number of commercial establishments in both Anchorage and Fairbanks who are, apparently, subscribers to Net Link which provides to the commercial establishments the Monday Night NFL Football Game on a live basis at 5:00 p.m. Based upon our conversation and my review of certain statutory provisions, it appears that the selling of this broadcast service by Net Link to these local commercial establishments and, in turn, their showing of the monday night football games on a live basis in Anchorage and Fairbanks is a violation of federal law.

We have sent notification to a number of commercial establishments advising them of the exclusive right of the local ABC affiliates in Alaska to show the Monday Night NFL Football Game on a delayed basis. The notification sent to these various commercial establishments has also notified them that live broadcast of the game by any means (either direct interception of the live ABC broadcast or, retransmission of the game on a live basis through Net Link) is a violation of federal law. Several of the commercial establishments to whom we have sent notice have responded that, because they purchased this broadcasting service from Net Link, their retransmission of the live Monday night football game in their commercial establishment is not illegal. Indeed, several of them have advised us that they were specifically told, when they purchased the service from Net Link, that it was lawful to broadcast these sports events live, since they were not intercepting the signal off the live satellite feed.

I have listed below the names and address of the various commercial establishments to whom we have sent letters of notification; the first seven or eight establishments identified we are almost certain are subscribers to Net Link and may have been told by Net Link when they purchased the service that showing the monday night football games live was lawful.

The Sports Edition
Anchorage Hilton Hotel
500 West Third Avenue
Anchorage, AK 99501

The Rumrunners
Anchorage Hotel
330 "E" Street
Anchorage, AK 99501

515 Cocktail Lounge
515 Fourth Avenue
Anchorage, AK 99501

The Gaslight Lounge
721 Fourth Avenue
Anchorage, AK 99501

Ole's Pub
708 Eat Fourth Avenue
Anchorage, AK 99501

Crossroads Lounge
1402 Gambell Street
Anchorage, AK 99501

Pierce Street Annex
701 East Tudor Road
Anchorage, AK 99503

Gwennie's Old Alaska
4333 Spenard Road
Anchorage, AK 99517

Cheechako Bar
317 West Fireweed Lane
Anchorage, AK 9903

The Peanut Farm
5227 Old Seward Highway
Anchorage, AK 99518

Hot Rods
4848 Old Seward Highway
Anchorage, AK 99503

Long Branch Saloon
1737 East Dimond Blvd.
Anchorage, AK 99507

The Pines
2421 East Tudor Road
Anchorage, AK 99507

F Street Station
325 "F" Street
Anchorage, AK 99501

Darwins Theory
426 "G" Street
Anchorage, AK 99501

4th Avenue Theater
630 West Fourth Avenue
Anchorage, AK 99501

Tony Roma's
1430 East Tudor Road
Anchorage, AK 99503

Al's Lounge
Al's Alaskan Inn
7830 Old Seward Highway
Anchorage, AK 99518

Timeout Lounge
4600 Old Seward Highway
Anchorage, AK 99503

The Petroleum Club
4104 Credit Union Drive
Anchorage, AK 99503

Garcia's
4140 "B" Street
Anchorage, AK 99507

Gold Rush Saloon
3399 Peger Road
Fairbanks, AK 99709

Red Fox Bar & Grill
995 Chena Pump Road
Fairbanks, AK 99709

Pike's Landing
4438 Airport Way
Fairbanks, AK 99709

Club Soda
Van Horn Road
Fairbanks, AK 99701

I have also attached four pages of subscribers to Net Link (as of August 1993) which identifies a number of locations where Net Link is being received which appear to be within the broadcast area of these Alaska ABC affiliates and are not, therefore, unserved households.

We are requesting that you notify the Net Link representative with whom you are expecting to meet on September 8, 1993 in Washington, D.C. that we consider the sale of this service by Net Link to any of these commercial establishments in Anchorage or Fairbanks to be unlawful and consider this letter a demand that they cease and desist immediately from continuing to provide this service to these establishments in the future. If they are unwilling to do so, we will to consider taking legal action in Anchorage, Alaska in U. S. District Court in order to stop this unlawful activity immediately.

One final question that I had concerns the subscription of this Net Link service by fraternal or charital organizations: Even though these types of organizations (the Moose, the Elks, the VFW, etc.) may be exempted from copyright protections under 17 USC § 110(10), it seems to me that these organizations are not exempt under the provisions of 17 USC § 119(a) of the Satellite Home Viewer Act of 1988. If that is correct, we would make the same demand to Net Link concerning these organizations as the commercial establishments identified above. I would be happy to provide the names, addresses and telephone numbers of these organizations in Anchorage and Fairbanks who may also be showing ABC sports broadcasts on a live basis through a subscription with Net Link.

In advance, I appreciate your attention to this matter and your courtesy and cooperation in assisting us in addressing this problem. If there is any additional information I can provide, or if you have questions for which I can provide answers, please do not hesitate to contact me at your convenience.

Very truly yours,

JERMAIN, DUNNAGAN & OWENS, P.C.

Bradley D. Owens

Enclosure

cc: Tom Cookerly
Irwin Starr

KIVI TELEVISION
Sawtooth Communications, Inc
1866 East Chisholm Dr Nampa, Idaho 83687-6899
Nampa (208) 467-3301 Boise (208) 336-0500 FAX (208) 465-5417

February 17, 1993

To: Wade Hargrove

Fr: Larry J. Chase

Re: White Area Enforcement

Over the past couple of years it is safe to say I and my Chief Engineer have gone through thousands of Netlink and Prime 24 subscriber lists. Throughout this time period we have turned in hundreds of subscribers who are in our Grade A signal. Grade B and ADI have never concerned us at KIVI due to mountainous terrain.

I never realized how the current bill was being abused until I ran into a detailed example. During a family get together at my wife's cousin's house I noticed KUSA of Denver, Colorado, on their television set. I asked how they were picking up the signal and they explained to me how they were telephone solicited. The White Area issue had not been discussed and they were unaware of any copyright problems. Months passed and their address showed up on a list of subscribers. I circled it and two years later they still had KUSA from Denver even though they live in the middle of our metro viewing area. In my opinion this is what broadcasters have been facing since the Home Satellite Act was first enacted. I would hope for something with teeth in it as we look towards replacing the law in 1994.

WEAR TV

04/16/93

Mr. Wade H. Hargrove
Counsel to the ABC-TV Affiliates
P.O. Box 1151
Raleigh, N.C. 27602

Dear Mr. Hargrove,

This letter is in response to Peter Desnoes' letter of March 22, requesting documentation of our station's problems in enforcing compliance with the Home Satellite Viewer Act.

Our station is deeply concerned over the lack of response by PrimeTime 24 and Netlink in meeting the requirements of the Act. Our station sends monthly update reports identifying those subscribers who definitely do not reside in "unserved households" and request the services to disconnect these subscribers or respond to the station if they feel our report is incorrect.

I have yet to see a single reply from either PrimeTime 24 or Netlink. The monthly reports which we receive from ABC lists the deletions by each service, but these seldom correspond with our previous requests for deletion ... and the time consumed by this crosschecking effort is tremendously costly to the station.

PrimeTime 24 and Netlink blatantly disregard the Act. It seems they never utilize any kind of pre-subscription screening process to determine if a potential customer is indeed already served by a network affiliate. Their contempt for the Act is shown by the fact that they eagerly sign up customers residing within our city of license! We feel that these services should be required to pre-screen customers, at a minimum, to insure that potential viewers do not reside within the Grade B signal contour of a primary network affiliate station. This could be easily accomplished by quick reference to a Television & Cable Factbook and an Atlas of state maps. Strict adherence to that one simple procedure would eliminate at least 90% of the station's work in seeking compliance of the Act.

With increasing competition from cable, satellite delivery and the upcoming DBS, it is imperative that the Act's sunset provision be eliminated, and the Satellite delivery companies be compelled to improve their procedures for compliance with the Act, in order to maintain the existing network/affiliate system so that stations like ours can continue to properly serve the needs of our local area audience.

Sincerely,

J. Landon Smith

Joe Landon Smith
Operations Manager

abc Television

WSIL-TV 3 abc

4/22/93

Mr. Wade Hargrove
Counsel to the ABC TV Affiliates
P.O. Box 1151
Raleigh, NC 27602

Dear Mr. Hargrove:

I've been asked to write to you regarding my experience with enforcement of the Home Satellite Viewer Act.

For the past two years, we have received monthly reports from Netlink and PrimeTime 24 of subscribers to their service in our area.

We have highlighted those whose addresses were within our Grade B Signal, and returned the list to those companies with a note that we suspected these subscriptions to be in violation of the Satellite Home Viewing Act.

My experience has been disheartening. Each month's list contained addresses well within the Grade B or Grade A contours of WSIL.

On no occasion did a representative of either company contact me regarding any of the possible violations. While, of course, individual subscribers did eventually leave the list, I was never informed that any subscriber was discontinued because of a violation of the act. And while individual subscribers changed, communities within our Grade B continually reappeared with new subscribers. In one case, the founder and former owner of WSIL appeared as a subscriber, although he continues to live in the same house near our city of license, Harrisburg, Illinois.

The communities of Harrisburg and other nearby communities consistently appeared on the list, although they are within the City Grade signal contours of WSIL. I have seen no evidence that there is ANY community in which either of these vendors declines to sell this service, and I have seen no evidence of any attempt at all to enforce the Home Satellite Viewer Act.

Sincerely,

Steve Wheeler

Steve Wheeler
President/General Manager
WSIL-TV

SW:bah

March 29, 1993

Wade H. Hargrove
Counsel to the ABC-TV Affiliates
P. O. Box 1151
Raleigh, North Carolina 27602

Dear Mr. Hargrove:

In the beginning we received lists monthly from ABC Network to check off satellite dish owners who were receiving the ABC Network signal within our viewing area. Now they have changed to quarterly with our last being in December, 1992. We always find a large number in our viewing area and even in the town nearest our transmitter. We check off these violations notifying our representative and it seems we are never accomplishing anything because in every report we have approximately the same number of violations. This job is a hassle and we never know whether or not anything is accomplished. We feel that our efforts are being ignored.

Yours truly,

James R. McComick

James R. McComick
President/General Manager

JRM/pjh

WJRT-TV 12 abc
2302 Lapeer Road
Flint, Michigan 48502
(313) 233-3130

March 29, 1993

SJL OF MICHIGAN CORP

Mr. Wade H. Hargrove
Counsel to the ABC-TV Affiliates
P O Box 1152
Raleigh, NC 27602

Dear Mr. Hargrove:

Like ABC affiliates across the country WJRT-TV12 is concerned about the apparent ineffectiveness of the Home Satellite Viewer Act to restrict the satellite delivery of our network's programming to dish owners in our market.

We regularly receive reports through ABC listing the addresses of newly connected subscribers to Primetime 24 and Netlink satellite services. Time and again communities and households appear on the lists which are able to receive, through the use of a conventional outdoor receiving antenna, an over-the-air signal of either Grade A or Grade B intensity from our television station. This seems to us to be an effective method for policing or enforcing the Home Satellite Viewer Act.

In this age of computer technology a program could easily be constructed to immediately identify those geographic areas which fall within any television station's Grade A and Grade B area. It shouldn't be necessary for the television station to provide an after-the-fact review of this information. Once a household has begun receiving ABC programming via satellite, a disconnect due to a review by the local ABC affiliate can only leave a negative impression on that household.

Additionally, the ABC affiliate has no way of knowing the timetable for producing the reports received by Primetime or Netlink. The review is time consuming work for the station's staff. If the affiliate chooses to double check the newest report with the last report to see if the noted households were actually "disconnected," this process will take twice as much staff time.

There must be a better way!

Regards,

Tom Bryson

Thomas Bryson
Vice President/General Manager

/sjg

April 2, 1993

Mr. Wade H. Hargrove
Counsel to the ABC Affiliates
P. O. Box 1151
Raleigh, North Carolina 27602

Dear Mr. Hargrove:

It is quite apparent we have a distinct and consistent problem with piracy of the ABC signal being sent to the ABC affiliates.

Due to the fact we cover such a large rural area, the number of home dishes impacting our business continues to grow.

We find little help in enforcing the Home Satellite Viewer Act and would like to go on record of our concern and desire to see more protection for the over-the-air broadcasters.

Sincerely,

Louis S. Wall
General Manager

LSW/mlj

2225 COBURG ROAD
PO BOX 7009
EUGENE, OREGON 97401-0009
503/485-5611

BRUCE R. LILJEGREN
GENERAL MANAGER

KEZI 9

March 29, 1993

Mr. Wade H. Hargrove, Esquire
Counsel to the ABC-TV Affiliates
Post Office Box 1151
Raleigh, N.C. 27602

Dear Wade:

I am writing at the request of Messrs. Desnoes and Behnke of the ABC Television Affiliates Association regarding our experiences with the enforcement of the Home Satellite Viewer Act.

I am sure that most market television stations face the same problems that KEZI does in even attempting to monitor and enforce compliance. Our situation is further complicated due to an irregular coverage area that is the result of a mountainous terrain. Site examination and signal strength measurement is required in many instances.

This is a serious problem and we believe that the satellite carriers must assume a larger role in assuring that network service is not provided outside "white areas." This should be accomplished through better screening of potential subscribers and through greater accuracy in reporting receiver locations. As it is now there are no "teeth" in the law to motivate satellite carriers to follow the rules.

Please feel free to contact us if we can be of any further assistance.

Sincerely,

Bruce R. Liljegren
General Manager

cc: Peter B. Desnoes

Lamco Communications Inc.
101 Commonwealth Avenue
Concord, MA 01742
(508) 371-3023

June 12, 1993

Mr. Wade Hargrove, Esq.
General Counsel - ABC Television Affiliates
P. O. Box 1151
Raleigh, NC 27602

Dear Mr. Hargrove:

As discussed, I live in Concord, Massachusetts, 20 miles from downtown Boston. Last week I hired a local company, Wayland TV, to repair my television antenna. When the repairman was almost finished, he told me that a great portion of his work today involves the installation of satellite dish receivers. He then tried to sell me a satellite dish. I told him I wasn't interested, because we generally watch only the three network stations and the PBS station, and I understood that we were not eligible to receive the networks via satellite since we can receive a good over-the-air signal from our local affiliates. He said that wasn't a problem - that all those for whom he has installed satellite dishes continue to receive network service via satellite. While there might be some exchange of papers, he said any request to drop network service would just be ignored. I told him I was still concerned, because I did not want to do something that was wrong, and furthermore, I understood that there was or would be equipment that would allow someone to drive up to the front of my house and determine whether I was receiving a network signal by satellite. He said there was no such equipment available today and that if such a device was made available, it could easily be circumvented.

Yours truly,

Marshall R. Noecker

SATELLITE HOME VIEWER ACT VIOLATIONS

March 10, 1993

Here at KPAX TV we have made a special effort to report all suspected violations of the Satellite Home Viewer Act to CBS and the appropriate satellite services vendor.

Montana is in a very mountainous region. Several areas that would normally be in our "Grade B" coverage area, do not receive acceptable reception due to being shadowed by a mountain or located in a canyon. We have made a concerted effort not to report homes that are in these types of areas.

Since 1989 we have reported 970 suspected violations of the Satellite Home Viewer Act. Out of this total 809 suspected violations were reported to Netlink. To date we have had very little response from any of the satellite service vendors. We also could not verify that any of the commercial business subscriptions we reported have been canceled.

We received a letter from a viewer that agreed that her Netlink subscription was violating the Satellite Home Viewer Act. She had sent two letters to Netlink and talked to several people. They still would not disconnect her subscription. It was only when we got involved and wrote the FCC and our U.S. Representative that Netlink finally disconnected her subscription.

Mark D. Rapson
Chief Engineer
KPAX Communications, Inc.

·YOUR HOMETOWN STATION·
WDBJ7
ROBERT G. LEE
President · General Manager

March 8, 1993

MAR 1 2 1993

Mr. William R. Murdoch
KSL-TV
Post Office Box 1160
Salt Lake City, Utah 84110-1160

Dear Bill:

A local home satellite dish seller recently had set up at a mall kiosk for the weekend. I was passing the kiosk and heard the salesman pitching to a couple, so I stopped to listen. He explained that the prospective buyers, who lived in the countryside near Roanoke, could take down their antenna and get the networks -- along with a bunch of other stuff -- off satellite. After the prospective buyers walked away, I introduced myself and asked whether the guy was acquainted with the law governing his ability to sell network service via Primetime 24 or similar vendors. Needless to say, he had no idea what I was talking about.

Monday came, and I called the owner of the company. He hung up on me.

Last month's Better Business Bureau bulletin included material on this subject, but was so vague I phoned our local BBB executive to vent my frustration. She then sent me the national BBB pamphlet in question. I have enclosed both for your amusement.

We need to educate consumer agencies of this sort as to the extent to which we are supposed to have protection. More and more, we seem to have absolutely nobody but ourselves on our side on this thing.

Best regards,

BOSTON PUBLIC LIBRARY
3 9999 05983 016 4

ISBN 0-16-043678-8
90000
9 780160 436789